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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 208

BOARD OF REGENTS OF THE
UNIVERSITY OF MARYLAND,
Petitioner,

vs.

TRUSTEES OF ENDOWMENT FUND OF THE
UNIVERSITY OF MARYLAND,
AND
MARYLAND TRUST COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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The Daily Record Co., Baltimore 3, Md.

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TO THE HONORABLE, THE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

The Petitioner, the Board of Regents of the University of Maryland, respectfully prays that a writ of certiorari issue to review the final decision and decree of the Court of Appeals of Maryland, entered in the above-entitled case on March 24, 1955.

CITATIONS TO OPINIONS BELOW

The memorandum of opinion of Circuit Court No. 2, of Baltimore City, Maryland (R. 22) is unreported and is printed in Appendix B, infra p. 16. The opinion of the Court of Appeals of Maryland, which is the highest Court of the State of Maryland, printed in Appendix B, hereto infra p. 51 (R. 100), is reported in 112 A. 2d 678, ... Md. .... (1955).

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on March 24, 1955 (R. 100, 121). The jurisdiction of this Court is invoked under Section 1257(3) of Revised Title 28 of the United States Code.

As the record will indicate (R. 17), the respondent in first filing the Bill of Complaint for a declaratory decree has "drawn into question" the validity of the state statute involved on the basis that it violated the Fourteenth Amendment of the Constitution of the United States. Respondents "specially set up and claimed" a federal right, privilege and immunity. In thus raising a substantial federal question, the respondent did so in accordance with the particular state practice of Maryland, and the petitioner having demurred, was given opportunity to be heard on the federal question, both in the lower and higher court, and the issue was determined in accordance with the provisions of Sec. 1257. As will be set out at a later point, the federal question raised was the basis for the determination.

From the outset, the Court of Appeals of Maryland, the highest state court, assumed that a specific federal issue was properly before it and then expressly considered and determined that issue. Under these circumstances the fram-

ing of the issue by the respondents need not be inquired into, *Saltonstall v. Saltonstall*, 276 U. S. 260, 267-8; *Edwards v. Elliott*, 21 Wall. 532, 549-51; *Charleston Federal Savings & Loan Asso. v. Alderson*, 342 U. S. 182, 185-6. It is submitted that the highest court's assumption of a federal question, and consideration and disposition of the validity of the state statute on the basis of repugnancy to the federal constitution has created an irrebuttable presumption that the federal question was timely and properly raised. *Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U. S. 182, 185-6; *Whitney v. California*, 274 U. S. 357, 360-1; *Manhattan Life Ins. Co. v. Cohen*, 234 U. S. 123, 134.

This Honorable Court has indicated on many occasions through decisions and rules that it will take jurisdiction to review the decisions of a State court, in accordance with general rules enunciated by Justice Story in *Crowell v. Randell*, 10 Pet. (U. S.) 368, 9 L. Ed. 458, where that State court decision indicated that a Federal question arose, a Federal question was decided, and the decision of the Federal question was necessary to determination of the issue in controversy.

While the opinion of the lower State court is replete with references to the Federal Constitution, the decision of our highest State court is so clear in meeting these requirements that the language of the highest court alone is set out herewith. As a preliminary matter, it is well to point out that the court, having found against the petitioner on the due process question on the ground that the statute exceeded "the permissible limit of the reserved power to amend the corporate charter", did not discuss the other points raised (112 A. 2d 686).

The Court stated:

"The appellee contends that the Act violates: (1) Article I, Section 10 of the Federal Constitution prohibiting the impairment by a state of the obligation of contracts, (2) the Fourteenth Amendment to the Federal Constitution and its State equivalent, Article 23 of the Maryland Declaration of Rights regarding due process, * * *" (112 A. 2d 680).

"Passing the question as to whether the reserved power can be validly exercised by a special act under the circumstances of the instant case, the question arises whether the contract clause of the Federal Constitution can ever be invoked in the case of a corporation formed subject to the reserved power of alteration or repeal. The appellant contends that the reserved power is one of the terms of the contract, and any objections to its exercise must be sought in other provisions of the basic law. In what appears to be the latest expression of the United States Supreme Court on the subject, Phillips Petroleum Co. v. Jenkins, 297 U. S. 629, 634, 56 S. Ct. 611, 613, 80 L. Ed. 943, it was said: 'The reservation of power to amend is a part of the contract between the state and the corporation and therefore section 10 of article 1 of the Federal Constitution does not apply'. Cf. Noble State Bank v. Haskell, 219 U. S. 104, 109, 31 S. Ct. 186, 55 L. Ed. 112. But continuing, the court said: 'The reserved power is not unlimited and cannot be exerted to defeat the purpose for which the corporate powers were granted, or to take property without compensation, or arbitrarily to make alterations that are inconsistent with the scope and object of the charter or to destroy or impair any vested property right'. Many other cases state the proposition that the reserved power cannot be exercised so as to defeat or substantially impair the fundamental purpose for which a corporation is formed" (112 A. 2d 682-3).

"(2) It has been said that the Dartmouth College case, supra, would perhaps have been decided as it was, even under a reserved power to amend, had the Fourtenth Amendment been then in effect, since it involved a deprivation of property. See Note, 40 Harv. L. Rev. 891, and Scott, Education and the Dead Hand, 34 Harv. L. Rev. 1, 9. * * * In dealing with the internal affairs of corporations, the traditional tests of due process are not strictly applicable, * * *" (112 A. 2d 683).

"The rule that an alteration that defeats or fundamentally changes the corporate purpose is beyond the constitutional power of the Legislature is conceded on both sides. Whether this is true because it is a violation of the contract clause of the Federal Constitution we need not decide. The Supreme Court and our Court of Appeals have both adopted the rule as a constitutional principle which has the status of a vested right, whether it stems from the law of implied contract, the law of property, or the corporation law. If the right is violated, we are constrained to hold that it violates the due process clause of the Fourteenth Amendment as well as the provisions of Article 23 of our Declaration of Rights and Section 40 of Article III of the Maryland Constitution.

"The nub of the controversy is the character of the alteration. The appellant says that the fundamental object of the Endowment Fund is to benefit the University, and the administration of the Fund is secondary and of no real importance. We think, however, that the change is fundamental" (112 A. 2d 684).

"* * * charter alterations must be reasonable and consistent with the scope and object of the act of incorporation.

"In the instant case, we think the complete transfer of management and control over the Endowment Fund to the Board of Regents is arbitrary and unreasonable" (112 A. 686).

These excerpts decisively indicate that the highest State Court recognized that a Federal question had arisen, decided that Federal question, and found it necessary in the determination of the issue to decide that Federal question. Cf. Annotation, 84 L. Ed. 925.

It is true that the State of Maryland possesses in its State Constitution in Article 23 of the Declaration of Rights a provision forbidding deprivation of property unless in accordance with the "Law of the Land". It is also true that this phase has been deemed to be equivalent to the words "Due process of law" as used in the United States Constitution, *Baltimore Belt R.R. Co. v. Baltzell*, 75 Md. 99, 33 Atl. 74; *Solvuca v. Ryan & Reilly Co.*, 131 Md. 270, 101 Atl. 710. However, almost the entire emphasis on the state court's opinion is put on the Fourteenth Amendment, and even if there can be said to be a non-Federal ground on which the state court could have possibly based its decision, the federal question and the state question are so interwoven in their intrinsic relationship, that they can not be considered to be independent. In the application of this Court's standards in making the inquiry of jurisdiction, *Abie State Bank v. Bryan*, 282 U. S. 765, 773, the rule has been enunciated that the non-Federal ground will not be considered adequate to support the judgment if the non-Federal ground is not independent of the federal question. As was said in *Enterprise Irrig. Dist. v. Farmer's Mut. Canal Co.*, 243 U. S. 157, 164: "Where the non-Federal ground is so interwoven with the other as not to be an independent matter * * * our jurisdiction is plain." Cf. *Minnesota v. National Tea Co.*, 309 U. S. 551; *State Tax Commission v. Van Cott*, 306 U. S. 514. Certainly here, there is "strong indication that the Federal Constitution as judicially construed controlled the decision below" 309 U. S. 556.

QUESTIONS PRESENTED

Whether a legislative exercise of the reserved power to amend corporate charters by transferring the management and control of a non-business charitable corporation from one group to another, violates vested rights, and therefore, violates the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The Dartmouth College case (*Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518 (U. S. 1819)) is so familiar to both bench and bar that perhaps, the most succinct statement of the question presented is:

Would the Dartmouth College case be decided as it was under a reserved power to amend if the Fourteenth Amendment was then in existence?

STATUTE INVOLVED

The statutory provision involved is Chapter 5 of the Acts of 1952, Laws of the State of Maryland, p. 9. It is printed in Appendix A, infra, p. 1.

STATEMENT

By Chapter 5 of the Acts of 1952, the General Assembly of Maryland, which constitutes the legislative body of that State, enacted into law an amendment of the charter of the Maryland Corporation operating under the name of "The Trustees of the Endowment Fund of the University of Maryland". The Trustees at no time received any compensation. The salient provision of the charter amendment was the provision that thenceforth its members should be the Regents of the University of Maryland (the governing body of the University) and that "all the rights, powers, duties, obligations and functions" of its members

should be conferred upon the Regents. Thereupon "the Trustees of the Endowment Fund of the University of Maryland", hereinafter referred to as the respondents, instituted proceedings against the Regents of the University of Maryland by way of a Bill of Complaint, in which a decree declaratory of the unconstitutionality of Chapter 5 was sought. The Regents, hereinafter referred to as the "Petitioners" demurred to the Bill of Complaint and the lower Court, being Circuit Court No. 2 of Baltimore City, Maryland, after argument and the filing of briefs, concluded to overrule the demurrer. Since the petitioner declined to file an answer, the Court entered a final decree, holding that Chapter 5 was unconstitutional.

Petitioner thereupon appealed to the Court of Appeals of Maryland. On appeal, the decree of the lower court was affirmed.

The Maryland Trust Company, although a titular party to the action, is in the nature of a stakeholder, having indicated its willingness to abide by whatever decree was entered in the premises.

The objects and purposes of the corporation is contained in the following clause:

> "The said corporation is hereby empowered to receive, hold, invest and control any money, funds or other property, real, personal or mixed, which may be hereafter or have been hitherto paid, delivered or conveyed to it by gift, bequest, devise or otherwise committed to it as an endowment fund or funds for said University of Maryland and either any or all of its several separate faculties and departments, and to apply the income of such fund or funds in its discretion to the benefit of said University and the several faculties and departments thereof to whichever such

funds may respectively appertain. And for the carrying out of the objects herein expressed, and for no other, the said corporation is hereby empowered to accept money, funds or other property in trust for said University and any or all of its several faculties and departments, and the same to administer according to the declared purpose of such trusts, and except when restricted by the terms of gifts the said corporation shall have power to change from time to time in its discretion the investment of any money, funds or other property committed to it; provided that all investments shall be made and held by 'The Trustees of the Endowment Fund of the University of Maryland' for the above mentioned purposes" (R. 61-62).

REASONS FOR GRANTING THE WRIT

The basis of the Petitioner's petition for writ of certiorari is that the highest state court of Maryland has decided a federal question of substance not heretofore determined by the Supreme Court of the United States.

Moreover, the federal question has been decided in a way probably not in accord with such decisions of this Honorable Court as may have application by way of analogy thereto.

The essential part of the decision is contained in that portion of the State Court's decision which says "In the instant case, we think the complete transfer of management and control over the Endowment Fund to the Board of Regents is arbitrary and unreasonable". The State Court held that this transfer of management and control defeated the purpose for which the corporation was formed. The State Court had previously enunciated the doctrine that an alteration that defeats or fundamentally changes the corporation purpose is beyond the constitutional power

of the Legislature as a violation of a vested right, and had stated that "If the right is violated, we are constrained to hold that it violates the due process clause of the Fourteenth Amendment . . ."

The inescapable conclusion to be drawn from a careful perusal of the State Court's opinion therefore is that it has enunciated a doctrine which goes beyond any previous opinion of the Supreme Court which the Petitioner has been able to find. That doctrine, it is submitted, may be summarized as follows: That, legislative exercises of the reserved power to amend corporate charters which transfer management and control of non-business charitable corporations from one group to another violate vested rights, and, therefore violate the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Clearly the question presented is of great importance in the administration of charitable corporation law throughout the states of the United States. If this decision stands, interpreting as it does the right of control and management of charitable corporations as a vested right, it calls for a re-examination by every state of its corporation law concerning charities and charitable trusts.

The examination and settlement of the question by this Court is plainly in the public interest, since there are thousands of charitable corporations who may claim immunity from change of corporation charters on the basis of the decision to the detriment of the exercise of legislative rights expressly found in state constitutions.

If the instant case concerned an ordinary business corporation, the decisions cited by the State Court would foreclose the question raised. In ordinary business corpora-

tion, judicial construction of the power of the Legislature to authorize changes in inter-corporation affairs is relatively stringent. See Note, 34 Mich. L. Rev. 859-867. The obvious reason for this stringency, and its application to vested property rights, is predicated on the very real possibility that charter alterations by the Legislature might present opportunities for large-scale manipulations of shareholder interests. See Note, 64 Harv. L. Rev. 1168 at 1179 (1951).

In sharp contrast, however, "If a non-business corporation is involved, amendments which alter the method of selecting its management are held valid on the ground that the right to vote is not a 'vested right' when it does not exist to protect an investment". Note, 54 Harv. L. Rev. 1368 at 1370.

This distinction between business corporations and non-business corporations is even more marked when the non-business corporation is in the nature of a charity, or charitable trust. In such cases, matters of vested rights clearly do not pertain to matters of corporate management and control, and a broader construction of the legislative exercise of the reserved clause, so long as consistent with the charitable aim, is given in favor of charter amendments. The decision of the State Court does not acknowledge this distinction between these varying types of corporations, and it is the failure to recognize the distinction which brought the Court to the conclusion at which it arrived, a conclusion buttressed by citations concerning business corporations.

The distinction between charitable corporations and business corporations has been said to rest on "society's interest in the efficient utilization of property held for chari-

table purposes", Note, 64 Harv. L. Rev. 1179, or on "the public interest in the administration of charities", Note, 40 Harv. L. Rev. 891 at 895. The foundation of the distinction is exhaustively discussed in the case of *Late Corporation of Latter Day Saints v. United States* (sometimes cited as *Church of Jesus Christ, etc. v. United States*), 136 U. S. 1, 34 L. Ed. 478. There, the court said, in discussing the *cy pres* doctrine, that "* * * the authority thus exercised arises in part from the ordinary power of the court of chancery over trusts and in part, from the right of the government or sovereign, as *parens patriae,* to supervise the acts of public and charitable institutions in the interests of those to be benefited by their establishment * * *". "* * * here the Legislature is the *parens patriae* * * *." "* * * the impracticability of pursuing a different course, however, is not the true ground of this rule of charity law. The true ground is that the property given to a charity becomes in a measure public property, only applicable as far as may be, it is true, to the specific purpose to which it is devoted, but within those limits consecrated to the public use, and become part of the public resources for promoting the happiness and well-being of the people of the state."

Well reasoned authorities acknowledging the right of state legislatures to effectuate changes in inter-corporate management of charitable corporations by the exercise of the reserved power have occupied a strong place in American jurisprudence. *Commonwealth v. Bonsall,* 3 Whart. 559 (Pa. 1838); *Pennsylvania College Cases,* 13 Wall. 190, 213 (U. S. 1871); *In re Mt. Sinai Hospital,* 250 N. Y. 103, 164 N. E. 871, 62 A. L. R. 564. Whether the reserved power of the Legislature to amend the charter of charitable corporations is nugatory as to management affairs, because of the due process clause of the Fourteenth Amendment,

should be clearly delineated by the Supreme Court of the United States in order to dispel the uncertainties and obfuscation arising out of the State court's decision.

CONCLUSION

For the foregoing reasons, this writ of certiorari should be granted.

And your Petitioner will ever pray.

Respectfuly submitted,

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APPENDIX A

Chapter 5, Acts of 1952, Laws of Maryland

AN ACT to repeal Section 2 of Chapter 435 of the Acts of 1929, said Act amending the Charter of the Trustees of the Endowment Fund of the University of Maryland, and to enact in lieu thereof a new section, said section to be known as Section 2 and relating to the membership of the Corporation known as "The Trustees of the Endowment Fund of the University of Maryland."

Section 1. Be it enacted by the General Assembly of Maryland, That Section 2, Chapter 435 of the Acts of 1929, be and it is hereby repealed.

Sec. 2. And be it further enacted, That a new section to be known as Section 2, said section to be in lieu of Section 2 of Chapter 435 of the Acts of 1929 and in lieu of Section 2 of Chapter 529 of the Acts of 1904, be and the same is hereby enacted to read as follows:

2. The said corporation shall have perpetual succession and its members shall be the Regents of the University of Maryland, constituted and organized at present, and such other or additional members of the said Regents of the University of Maryland as may, from time to time, be appointed as authorized by law; and all the rights, powers, duties, obligations, and functions now conferred by any and every provision of law or by the Charter of "The Trustees of the Endowment Fund of the University of Maryland" shall be conferred upon the Regents of the University of Maryland, it being the intention of this Act that said Regents shall, from the date of passage hereof, be considered for all purposes as the sole members of the Corporation found [sic] under Articles of Incorporation dated the 29th day of June, 1893, and recorded among the Charter Records of Baltimore City in Liber J. B. No. 31 at folio 167, as said charter has been amended from time to time.

Sec. 3. And be it further enacted, That this Act shall take effect June 1, 1951.

APPENDIX B

OPINION OF COURT

Circuit Court No. 2 of Baltimore City

MOSER, J.

The Complainants in this cause of action were seven of the nine duly elected members of the Maryland corporation known as "The Trustees of the Endowment Fund of the University of Maryland". The eleven individual defendants are the duly appointed members of the Board of Regents of the University of Maryland.

Chapter 5 of the Acts of the General Assembly of Maryland of 1952 purports to amend the Charter of The Trustees of the Endowment Fund of the University of Maryland and thereby to designate the Regents of the University of Maryland as the members of the said Corporation in the place and stead of the complainants, and the other two elected members.

This proceeding was instituted to determine whether said Chapter 5 of the Acts of 1952 is valid and effective or is unconstitutional and void and thereby to determine whether the complainants or the individual defendants now constitute the members of The Trustees of the Endowment Fund of the University of Maryland.

The Maryland Trust Company is likewise a defendant, and for many years prior to the enactment of Chapter 5 of the Acts of 1952 was duly designated as the agent and custodian of the securities and funds belonging to the Corporation. As such agent and custodian the Maryland Trust Company now holds cash and securities of the value of approximately $2,000,000.00 with an annual income therefrom of approximately $38,000.00.

The complainants, together with Willam P. Cole, Jr., one of the defendants, and Dr. H. C. Byrd, were all the duly elected members of the Corporation as it existed prior to the enactment of Chapter 5 of the Acts of 1952, and un-

less the complainants and the said William P. Cole, Jr., and Dr. H. C. Byrd have been validly removed as members of the Corporation by virtue of said statute of 1952, they are still the duly elected members of said Corporation.

The complainant, Arthur M. Shipley is the President of said Corporation, Dr. H. B. Wylie is the Secretary-Treasurer of said Corporation, and the complainants, Albert Burns, Robertson Griswold, Dr. Arthur M. Shipley and Dr. H. B. Wylie are the acting Executive Board of said Corporation.

The Court deems it helpful here to narrate in part the corporate history of The Trustees of the Endowment Fund of the University of Maryland and the legislative history of Chapter 5 of the Acts of 1952, and to review in part the factual situation as it appertains to the endowment fund.

The Trustees of the Endowment Fund of the University of Maryland, sometimes hereinbefore and hereinafter for convenience being referred to as corporation, is a body corporate, duly organized and existing under the laws of the State of Maryland. It was incorporated on June 29, 1893, under the General Corporation Laws of the State under the then name of "The Trustees of the Endowment Fund of the Faculty of Physic of the University of Maryland of Baltimore City."

The original charter of the Corporation recited that it was formed as:

> "* * * corporation for educational purposes in connection with and in aid of the School of Medicine of the University of Maryland in Baltimore City conducted by the Faculty of Physic of said University and for the specific object of receiving, investing and controlling an endowment fund for said School of Medicine and applying the income thereof in the discretion of said Trustees to the exclusive benefit of said School."

The original charter provided further that the term of the corporate existence was limited to forty years, that its

operations were to be carried on in Baltimore City where its principal office was to be located, and that the Corporation was to be managed by an Executive Committee of four Trustees.

Subsequent to its incorporation and prior to 1952, the charter of the Corporation was amended three times: by Chapter 529 of the Acts of the General Assembly of Maryland of 1904, by Chapter 435 of the Acts of the General Assembly of Maryland of 1929, and by Articles of Amendment filed with the State Tax Commission of Maryland on April 9, 1946, pursuant to the General Corporation Laws of Maryland.

By Chapter 529 of the Acts of the General Assembly of Maryland of 1904, the charter of the Corporation was amended so as to change its name to its present form and to give the Corporation perpetual succession. It was further provided that the nine persons who were then the members of the Corporation "shall severally continue as such until their membership be terminated by death, resignation or removal". Provision was made for the removal of a member by a two-thirds vote of all the members, "provided that any member so removed be first furnished with a copy of the ground of removal and be given an opportunity to make answer thereto". The Act further provided that in the event of a vacancy in the membership, the remaining members should elect someone to fill the vacancy within one year after its occurrence, but it was required that such new members be alumni of the University of Maryland and that the membership of the Corporation should at all times consist of five graduates of the School of Medicine and four graduates of the School of Law.

By Section 3 of Chapter 529 of the Acts of 1904, the powers of the Corporation were expressed as follows:

> "That the said corporation be and it is hereby empowered to receive, hold, invest and control any money, funds or other property, real, personal or mixed, which may be hereafter or have been hitherto paid, delivered

or conveyed to it by gift, bequest, devise or otherwise committed to it as an endowment fund or funds for said University of Maryland, and either any or all of its several separate faculties and departments, and to apply the income of such fund or funds in its discretion to the benefit of said university and the several faculties and departments thereof to whichever such funds or funds may respectively appertain. And for the carrying out of the objects herein expressed and for no other, the said corporation is hereby empowered to accept money, funds or other property in trust for said university and any or all of its several faculties and departments, and the same to administer according to the declared purpose of such trusts, and except when restricted by the terms of gifts the said corporation shall have power to change from time to time in its discretion the investment of any money, funds or other property committed to it; provided that all investments shall be made and registered in the name of 'The Trustees of the Endowment Fund of the University of Maryland'."

Section 4 of said Chapter 529 provided for an Executive Committee of four to be elected by the members annually for among their own number, "which committee shall be empowered to manage the affairs of the Corporation, and said committee shall organize by the election of a President and a Secretary and Treasurer". The Executive Committee was required to present to the General Alumni Association of the University of Maryland at its annual meeting, a written report showing the condition and amount of all funds in hand on the preceding December 31st, "together with a detailed list of their investment, and the purposes for which they are respectively held".

Immediately prior to 1929, the membership of the Corporation was not composed solely of the alumni of the University of Maryland of whom five were to be graduates of the School of Medicine and four to be graduates of the School of Law as required by the amendment of the Char-

ter pursuant to Chapter 529 of the Acts of 1904. Accordingly, by Chapter 435 of the Acts of the General Assembly of Maryland of 1929, the Charter of the Corporation was again amended so as to eliminate therefrom the requirement that the members of the Corporation be alumni of the University of Maryland, and that the membership at all times consist of five graduates of the School of Medicine and four graduates of the School of Law. Chapter 435 of the Acts of 1929 became effective on June 1, 1929.

Further articles of amendment to the charter were filed with the State Tax Commission of Maryland on April 9, 1946, which in effect eliminated the requirement that all investments be "registered in the name of The Trustees of the Endowment Fund of the University of Maryland". Accordingly under its charter as it is amended and restated, the Corporation is a non-stock corporation consisting of nine members with perpetual succession and the membership is self-perpetuating.

The affairs of the Corporation are managed by an Executive Committee of four, which Committee elects from its members and officers of the Corporation. The powers of the Corporation have been hereinabove set forth and quoted from Section 3 of the Acts of 1904 with the minor change made in this Section by the Articles of Amendment of 1946.

At the 1951 Session of the General Assembly of Maryland there was introduced and passed, House Bill No. 701, reading as follows:

"A Bill Entitled

"An Act to repeal Section 2 of Chapter 435 of the Acts of 1929, said Act amending the Charter of the Trustees of the Endowment Fund of the University of Maryland, and to enact in lieu thereof a new section, said section to be known as Section 2 and relating to the membership of the Corporation known as 'The Trustees of the Endowment Fund of the University of Maryland'.

"Section 1. *Be it enacted by the General Assembly of Maryland,* That Section 2, Chapter 435 of the Acts of 1929, be and it is hereby repealed.

"Sec. 2. *And be it further enacted,* That a new section to be known as Section 2, said section to be in lieu of Section 2 of Chapter 435 of the Acts of 1929 and in lieu of Section 2 of Chapter 529 of the Acts of 1904, be and the same is hereby enacted to read as follows:

"2. *The said corporation shall have perpetual succession and its members shall be the Regents of the University of Maryland, constituted and organized at present, and such other or additional members of the said Regents of the University of Maryland as may, from time to time, be appointed as authorized by law; and all the rights, powers, duties, obligations, and functions now conferred by any and every provision of law or by the Charter of 'The Trustees of the Endowment Fund of the University of Maryland' shall be conferred upon the Regents of the University of Maryland, it being the intention of this Act that said Regents shall, from the date of passage hereof, be considered for all purposes as the sole members of the Corporation found (sic) under Articles of Incorporation dated the 29th day of June, 1893, and recorded among the Charter Records of Baltimore City in Liber J. B. No. 31 at folio 167, as said charter has been amended from time to time.*

"Sec. 3. *And be it further enacted,* That this Act shall take effect June 1, 1951."

House Bill No. 701 was vetoed by the Governor of Maryland who, in his veto message of May 7, 1951, wrote in part as follows:

" 'The Trustees of the Endowment Fund of the University of Maryland' was incorporated by Chapter 529 of the Acts of 1904 of the General Assembly of Maryland in 1904 as amended by Chapter 435 of the Acts of 1929. On April 9, 1946, the Corporation was chartered

under the General Corporation Law and subsequently its corporate existence has not been derived from Legislative Acts.

"The Trustees include Albert Burns, Judge William P. Cole, Dr. Charles Reed Edwards, Horace E. Flack, Robertson Griswold, Dr. Arthur M. Shipley and Judge W. Conwell Smith. These independent trustees, who are unpaid, have been handling these funds for nearly half a century in a fiduciary capacity.

"The provisions of House Bill No. 701 are designed to replace this independent Board of Trustees by the Regents of the University of Maryland. Such a transfer to the Regents of the University of Maryland would defeat the purposes for which these trusts were explicitly created and frustrate the purpose of the donors in making the bequests and gifts to the Trustees of the Endowment Fund to be held in trust for specific purposes. In addition, I believe that under the circumstances the constitutionality of the Bill is extremely questionable. Accordingly, I am returning this Bill without my approval."

Thereafter, at a meeting of the Corporation, the members thereof considered an opinion of counsel as to the constitutionality of House Bill No. 701 and thereupon adopted a motion that its constitutionality be tested by amicable court procedure in the event that the veto of the bill should be over-ridden by any subsequent action of the legislature. In voting in favor of said motion, William P. Cole, Jr., and Dr. H. C. Byrd, members of the Corporation, stated that "whereas they agreed it was in order to resort to amicable court action to arrive at a decision, they did not wish to give the impression in voting for the motion that they believed House Bill No. 701 to be unconstitutional". It was thereafter sought to have the Board of Regents of the University of Maryland agree to a special case stated, but this proved unsuccessful and the said William P. Cole, Jr., as well as Dr. H. C. Byrd, would not join as complainants in this proceeding.

The corporate history of the University of Maryland is likewise interesting and important in this narration of factual background.[1]

The history of the University of Maryland begins with the incorporation of "The College of Medicine of Maryland" by Chapter 539 of the Acts of the General Assembly of Maryland of 1807. This corporation was to be governed or managed by a Board of Regents but its faculty also had a large measure of independence so as to constitute almost a separate corporation. By Chapter 159 of the Acts of the General Assembly of Maryland of 1812, the faculty of "The College of Medicine of Maryland" was authorized to annex unto itself faculties of Divinity, Law, and Arts and Sciences, the members of the four faculties together with the Provost to constitute a corporation under the name of "The Regents of the University of Maryland".

Thereafter by Chapter 190 of the Acts of the General Assembly of Maryland of 1825, Chapter 159 of the Acts of 1812 was amended, the Board of Regents was abolished, and the government of the institution was transferred to a Board of twenty-one Trustees upon whom were conferred all the powers and duties previously belonging to the Regents. However, by the decision of the Court of Appeals of Maryland in *Regents v. Williams*, 9 G. & J. 365 (1838), the Act of 1825 was held unconstitutional, and thereafter the property and control of the University of Maryland was restored to the Regents appointed pursuant to Chapter 159 of the Acts of 1812. The Act of Incorporation was again supplemented and amended by Chapter 88 of the Acts of 1882.

The "Maryland Agricultural College" was incorporated by Chapter 97 of the Acts of the General Assembly of Maryland of 1856, as a private stock corporation, managed by twenty-two Trustees. At the same time, the legislature agreed to make an annual appropriation of $6,000.00 as an endowment for the college, reserving to itself, however,

[1] See also the opinion of the Court of Appeals of Maryland in *Regents of the University of Maryland v. Williams*, 9 G and J 365 (1836).

the right to withdraw all or any part of said endowment. By Chapter 265 of the Acts of 1858, the number of Trustees of the College was increased to twenty-five, and by Chapter 178 of the Acts of 1865, the Comptroller of the State was directed to make certain additional payments to the college, and the members of the State Board of Education were declared to be ex officio members of the Board of Trustees. The college experienced financial difficulties and by Chapter 53 of the Acts of the General Assembly of 1866, the legislature appropriated money to liquidate the indebtedness of the college and to purchase furniture and apparatus upon condition that the college would by deed make the State of Maryland an equal joint owner of all the property then owned by the college. The same Act reduced the number of Trustees to eleven and provided that four should be members of the State Board of Education with the remaining seven to be elected by private stockholders.

By Chapter 231 of the Acts of the General Assembly of 1880 the number of Trustees was increased to twelve, of whom five were to be elected by private stockholders and the remaining seven were to be certain designated state officials.

By Chapter 326 of the Acts of the General Assembly of 1888, the number of Trustees was increased from twelve to eighteen of whom five were to be elected by private stockholders and the remaining thirteen were to consist of certain designated state officials and certain other persons to be appointed by the Governor.

The State continued to advance funds to aid the college which in 1880 had become a Land Grant College, but the financial difficulties persisted and finally by Chapter 128 of the Acts of the General Assembly of Maryland of 1914, the legislature directed that a mortgage which was held by the State on the lands of the college be foreclosed to the end that the college would become entirely a State institution.

By Chapter 372 of the Acts of 1916, the "Maryland State College of Agriculture" was incorporated and had conferred

upon it all the endowments, powers, duties and obligations of the "Maryland Agricultural College".

By Chapter 480 of the Acts of the General Assembly of Maryland of 1920, the University of Maryland and the Maryland State College of Agriculture were merged under the name of the "University of Maryland" and the government of the University of Maryland after the consolidation of the two institutions became effective, was to be vested in a Board of Trustees to be thereafter known as the "Regents of the University of Maryland", and said Regents were vested with all the powers, rights and privileges and charged with all the duties and obligations appertaining thereto and theretofore vested in the Board of Trustees of the Maryland State College of Agriculture and the Regents of the University of Maryland.

Section 6 of Chapter 480 of the Acts of 1920 provided that the same should become effective on July 1, 1920, provided that before that date, said Act should be accepted and the merger of the two institutions be approved by the Regents of the University of Maryland and the Board of Trustees of the Maryland State College of Agriculture. The Act of 1920 was duly approved by the governing boards of the two institutions and since that time the University of Maryland has acted under the provisions of Chapter 480 of the Acts of 1920, as amended by Chapter 925 of the Acts of the General Assembly of Maryland of 1941, which latter Act increased the number of Regents from nine to eleven. Until the merger of the two institutions, there had been no amendments of the Charter of the Regents of the University of Maryland nor had the University of Maryland as authorized by Chapter 159 of the Acts of 1812 established Colleges of Divinity and Arts and Sciences. A college of Law had been established, and from about 1830 to 1876, the Baltimore College, a separate corporation, was operating in effect as the College of Arts and Sciences of the University of Maryland. From 1876 until 1905, there was no college of Arts and Sciences, but in the latter year a contract was made between the University of Maryland

and St. John's College at Annapolis by which St. John's College became the college of Arts and Sciences of the University for a tentative period of five years, although the two institutions continued to maintain their separate charter rights and financial independence.

This informal arrangement was made workable by the election of Dr. Thomas Fell, then President of St. John's College as Provost of the University of Maryland. In 1893, however, the University of Maryland consisted only of the Medical College and the School of Law, but the Medical College had a Department of Dentistry and a Department of Pharmacy which were operated almost as independent colleges. These four schools, Medicine, Dentistry, Pharmacy and Law, all of which were located in Baltimore City, legally constituted the University of Maryland from the latter part of the 19th century until 1920. There was no alumni association of the University of Maryland consisting of these four schools, but the Medical College had an Alumni Association which started the movement for a permanent endowment fund for the School of Medicine in 1893. This lead to the incorporation of "The Trustees of the Endowment Fund of the Faculty of Physic of the University of Maryland of Baltimore City" on June 29 of that year.

The first contributions to the Corporation for the endowment fund were few and small and in the first decade of the existence of the fund the amount collected was but a few thousand dollars. In 1903 the General Alumni Association of the University of Maryland, and which embraced all four of the schools located in Baltimore City, was formed, and in preparation for the centennial celebration of the University of Maryland to be held in 1907, the General Alumni Association undertook to broaden the endowment fund to include the entire University, which then consisted of the Schools of Medicine, Dentistry, Pharmacy and Law, located in Baltimore, and not only the School of Medicine. This was the reason for the amendment made to the Charter of the Corporation by the Act of 1904, after which the

General Alumni Association commenced an active drive to raise an endowment fund of $100,000. by 1907.

Strenuous efforts were made to induce the Alumni to make contributions to the endowment fund but by the end of 1907, the contributions received by the Corporation amounted in the aggregate to only approximately $15,-000.00. Some of these contributions were limited to specific purposes such as research and scholarships, whereas others were general donations.

The Trustees of the Endowment Fund however expended only the income from the gifts or donations and constantly emphasized the fact that the endowment fund was to be a permanent fund to be retained intact and the interest only to be used.

In soliciting contributions to the endowment fund, it was emphasized that the endowment fund would always be managed and controlled by a separate corporation completely independent of the governing body of the University. Statements to this effect are illustrated by articles appearing from time to time in "Old Maryland" a monthly publication of the University of Maryland, and similarly in "The Hospital Bulletin" which was published by the School of Medicine. It was repeated that "this Endowment is permanent; it is a trust fund protected by a State Charter"; and that the Fund "is protected by a special charter of the Legislature of Maryland; it is in the hands of an independent, self-perpetuating board".

The annual catalogue of the School of Medicine refers also to the Endowment Fund, the first such announcement appearing in the catalogue for the session 1893-94, and it likewise shows similar information with respect to the endowment fund from that date until 1920. Beginning with 1920 and after the merger of the University of Maryland and the Maryland State College of Agriculture, the University published annual catalogues for each of the Schools or colleges comprising the University. In the separate catalogue of the School of Medicine there are references to the

Endowment Fund and a suggested form of bequest to the Endowment Fund as well as a separate suggested form of bequest to the Board of Regents for its general purposes. In the 1904-1905 catalogue of the School of Medicine, these forms of bequest are stated as follows:

"To the School of Medicine

"I give, devise and bequeath to the Regents of the University of Maryland, for the benefit of the Faculty of Physic, a corporation incorporated under the laws of the State of Maryland (Here state amount or describe property)."

"To Endowment Fund

"I give, devise and bequeath to The Trustees of the Endowment Fund of the University of Maryland, a corporation incorporated under the laws of the State of Maryland, for the benefit of the Faculty of Physic (Here state amount or describe property)."

The Corporation now holds forty-two separate funds, the corpus of which as of December 31, 1952, amounted in the aggregate to approximately $1,932,000.00. Some of the funds are simple donations or gifts without restrictions; others are gifts by will or otherwise with instructions from the donors as to the manner in which they may be used.

It is asserted by the Board of Regents of the University of Maryland that they are now and since June 1, 1952, have been the sole members of the "The Trustees of the Endowment Fund of the University of Maryland", and they have demanded that the officers of the Corporation surrender to said Board of Regents all books, papers and records belonging to the Corporation and all funds, property and assets held by the Corporation. A similar demand has been made upon the defendant, the Maryland Trust Company as custodian and agent of the Corporation. The complainants, believing that they would be acting improperly and in dereliction of their duties as trustees if they comply with

the demands of the Board of Regents, have refused to comply with such demands unless Chapter 5 of the Acts of 1952 shall have been declared constitutional and valid.

Accordingly this proceeding has been brought in order that the claims of the Regents to sole title in the right of possession of the books and records and of the assets and funds of the Corporation might be disposed of, and the Corporation made secure in the unmolested enjoyment of its alleged rights and property, and it is likewise sought to enjoin the Maryland Trust Company as depositary from delivering the funds, property and assets of the Trustees of the Endowment Fund into the possession or custody of or for the account of, or subject to the order of the Regents.

By appropriate proceedings, the complainants constitute not only the members but also the Trustees and the Corporation "The Trustees of the Endowment Fund of the University of Maryland".

To the Bill of Complaint, the Maryland Trust Company has filed its answer submitting itself to the orders and decrees of this Court, and what is hereafter referred to as the position or contentions of the defendants will not apply to it. The defendants constituting the Regents of the University of Maryland, have filed a general demurrer. It is contended and asserted on behalf of the complainants that the facts show and the efforts made to establish a permanent Endowment Fund for the University of Maryland show that the funds were solicited largely by donations of the Alumni of the University and particularly by the Faculty and Alumni of the Medical School, and were donated by the various donors on the representation that such funds would always be administered and held as a permanent Endowment Fund by independent trustees wholly free from the control or direction of the Board of Regents of the University of Maryland. It is the position of the complainants that Chapter 5 of the General Assembly of Maryland of 1952 is a breach of faith with those who donated the funds and with those who solicited the donations, and that it violates the contract rights of the donors

and the Corporation and deprives each of their property by legislative fiat and attempts to transfer said property to other persons without just compensation. It is accordingly averred further by the complainants that Chapter 5 of the Acts of 1952 is unconstitutional in that it violates Section 1 of the 14th Amendment of the Constitution of the United States, Article 23 of the Declaration of Rights of the State of Maryland, and Section 40 of Article 3 of the Constitution of Maryland, and deprives the Corporation and the donors of the endowment funds held by it of their liberties, privileges and property without due process of law and without just compensation being paid therefor. It is further asserted on behalf of the complainants that said Act is invalid because nowhere in the title or body of the Act is there any reference to or repeal of the 1946 amendment to the Charter of the Corporation which Charter as amended in 1946 is wholly inconsistent with said Chapter 5 of the Acts of 1952, so that in effect it is argued that the title of the Act of 1952 is defective under Article III, Section 29 of the Maryland Constitution.

Other grounds for unconstitutionality are asserted by the complainants who maintain that Chapter 5 of the Acts of 1952 is unconstitutional as a specific law in violation of Article III, Section 33 of the Maryland Constitution and that it is likewise void under the 14th amendment to the Federal Constitution as a denial of equal protection of the laws.

Such then are the facts and the contentions raised with respect thereto by the complainants. The issue of constitutionality *vel non* must be decided.

In seeking the solution to the issue of constitutionality, it should be stated, ab initio, that there is no question of the power of the legislature to amend the Charter of a corporation. Since the Constitution of 1867, this power has existed under Article III, Section 48 of the Maryland Constitution, which provides in part as follows:

> "* * * All charters granted, or adopted in pursuance of this section, and all charters heretofore granted and created, subject to repeal or modification, may be altered from time to time, or be repealed; * * *."

Under Article 23, Section 1(g) of the Maryland Annotated Code of 1951, the statute contains this language:

> "The charter of every corporation formed prior to June 1, 1951, which is subject to repeal or modification and the charter of every corporation formed under the provisions of this Article shall be subject to repeal or modification by public general law of the General Assembly."

This statute was originally enacted in the General Corporation Law of 1868.

The Legislature's reserved power to amend corporate charters is however not unlimited.

Under Section 10 of Article I of the Constitution of the United States, it is provided that "no State shall . . . pass any . . . law impairing the obligation of contracts, . . .", and as early as 1819 the Supreme Court in a landmark decision expressed through Mr. Chief Justice Marshall in the *Dartmouth College* case, interpreted this clause in the Constitution to forbid the sovereign State of New Hampshire to amend the charter of Dartmouth College by legislative enactment. The premise established in that case was that the corporate charter is a contract not only between the stockholders or members *inter sese* but likewise between the corporation and the sovereign and that as contracts, such charters are within the protection of that constitutional provision.

> Dartmouth College v. Woodward, 4 Wheat. 518 (1819).

In his concurring opinion in the *Dartmouth College* case, Mr. Justice Story pointed to the path by which the states

could avoid the rigorous effect of the court's holding, that is by reserving unto themselves the right to alter, amend or repeal charters of corporations thereafter granted. The method suggested by Justice Story was accepted generally, and thereafter few charters were granted without explicit reservation in the legislature to alter or repeal them. It was soon discovered, however, that this was a cumbersome method, requiring inserting the reservation in each charter so that the methodology thereafter established was to provide for a blanket reservation written either into the various state constitutions or into the general laws of the state, by which the reservation was preserved to the state legislatures to alter, amend or repeal the charters of corporations subsequently granted.

Maryland Constitution, Article III, Section 48.
Article 23, Section 1(g), Maryland Annotated Code, 1951 edition.

Since the *Dartmouth College* case, courts in various jurisdictions have had many occasions to examine and define the scope of the reserved powers of legislatures to alter, amend or repeal corporate charters. These cases established the principle that the reserved power is not unlimited but can be exercised only within certain prescribed boundaries which the courts have consistently recognized.

Coombes v. Getz, 285 U. S. 434 (1932);
Sinking Fund Cases, 99 U. S. 700 (1878);
Holyoke Co. v. Lyman, 15 Wall. 500 (1872);
Miller v. State, 15 Wall. 478 (1872);
Breslav v. N. Y. & Queens Elec. Lt. & Power Co., 249 App. Div. 181 (1936), aff'd without op., 273 N. Y. 593 (1937);
United Railways v. Baltimore, 127 Md. 660, 673 (1916).

The adjudications upon this point have established the doctrine that the legislature cannot, under the guise of a

charter amendment, impair the fundamental object of the grant in the original charter of the corporation.

> "Where the legislature is given the constitutional power to alter, revoke or annul a charter, the charter is still accounted a quasi contract * * *."
>
> Manheim Borough v. Manheim Water Co., 229 Pa. 177 (1910).

The facile argument that if the power to repeal the charter exists, the legislature can impose upon the corporation any changes, regulations or requirements that it chooses, has not been accepted by the courts, and certainly for sufficient reason.

> State v. Cumberland & Penna. R.R., 105 Md. 478.

Where the repeal of a charter occurs, certain legal consequences necessarily follows. For example, the corporate assets of the dissolved corporation will be distributed according to the applicable law. The reserved power to repeal corporate charters does not constitute a carte blanche invitation to the state to do anything it wishes by way of amendment, alteration or changes. In *Lake Shore Ry. v. Smith*, 173 U. S. 684, (1899) the Michigan legislature amended the general railroad law of the state to provide that all railroads should sell 1000-mile tickets at a price set in the act which was less than the established fares.

The statute was invalidated as being violative of the 14th Amendment. The Court in its opinion stated:

> "To say that the legislature has power to absolutely repeal the charter of the company and thus to terminate its legal existence does not answer the objection that this particular exercise of legislative power is neither necessary nor appropriate to carry into execution any valid power of the State over the conduct of the business of its creature. To terminate the charter and thus end the legal life of the company does not

take away its property, but, on the contrary leaves it all to the shareholders of the company after the payment of its debts.[2]

In any event the reserved power cannot be exercised so as to result in a denial of due process or equal protection.

Philips Petroleum Co. v. Jenkins, 297 U. S. 629 (1936);
Breslav v. N. Y. & Queens Elec. Lt. & Power Co., supra.

From the decisions, the following principles emerge. First, the reserved power of the legislature to amend or repeal charters of corporations may not be exercised to make any alteration in the charter that will defeat or substantially impair the fundamental purpose or object of the original grant.

"* * * the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant * * *." Miller v. State, 15 Wall. 478 (1872).

"Power to legislate, founded upon such a reservation, is certainly not without limit, but it may safely be affirmed that it reserves to the legislature the authority to make any alteration or amendment in a charter granted, subject to it, that will not defeat or substantially impair the object of the grant, * * *." Holyoke Co. v. Lyman, 15 Wall. 500, 522 (1872).

"* * * such power to amend the charters of corporations may be exercised to make any alteration or

[2] It has been suggested by counsel in the instant case that if the Corporation should be deemed dissolved by Chapter 5 of the Acts of 1952, then its assets would have to be distributed: (1) to reversioners or remaindermen; (2) to a new trustee appointed by the court under its general equity powers for any property originally given in trust for specific purposes, and (3) to some other appropriate Maryland corporation to be selected by the Court in exercise of its *cy pres* power under Article 16, Section 131 and that none of the assets could be transferred to the Regents since they are not a corporation of "similar or analagous character or purpose" as required by said Section 131 of Article 16.

amendment in a charter granted that will not defeat or substantially impair the object of the grant * * *." Fair Haven R.R. v. New Haven, 203 U. S. 379 (1906).

"The reserved power is not unlimited and cannot be exerted to defeat the purpose for which the corporate powers were granted * * *." Phillips Petroleum Co. v. Jenkins, 279 U. S. 629 (1936).

"The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation." Shields v. Ohio, 95 U. S. 319 (1877).

"* * * the Legislature under its reserved power * * * may amend any charter in any respect that is not fundamental when the object of the corporation and property acquired by it are considered. * * *." Breslav v. N. Y. & Queens Elec. Lt. & Power Co., supra.

"If then the Legislature has the power to alter or annul the charter of the Telegraph Company, because the corporation has agreed it may exercise this power, it may assuredly make the alteration as lawfully by the substitution of a new charter as by the amendment of the old charter, provided such substituted charter be germane, and necessary to the objects and purposes for which the company was organized." Sprigg v. Western Telegraph Co., 46 Md. 67 (1877).

"* * * the Legislature had the power, it is conceded, to alter and amend its charter, provided such amendment does not change *fundamentally the nature of the charter and the objects for which it was* granted. * * * the right therefore of the Legislature to alter and amend the charter of the defendant corporation is not, and could not, be denied. At the same time we agree with the appellant that it could not change fundamentally the nature and character of the charter itself. It could not, under the guise of an amendment, substitute a new and different charter with distinct and

different purposes, and oblige the stockholders to accept it." Webster v. Cambridge Seminary, 78 Md. 193 (1893) [emphasis by the Appellate Court.]

The complainants aver that Chapter 5 of the Acts of 1952 substantially impairs the objects of the original charter of the Trustees of the Endowment Fund of the University of Maryland and completely defeats the object of that grant in that the primary object of the Corporation is to constitute as independent body investing and administering funds which may come into its possession for the purposes specified in aid of the various schools or colleges of the University of Maryland, and that its theory receives emphatic support through the holding out that the Endowment Fund would be completely and perpetually independent of the Regents of the University. By way of illustration, the original charter of the Corporation provides in its purpose clauses that it is formed "for the specific object of receiving, investing and controlling an endowment fund for said School of Medicine and supplying the income thereof in the discretion of said Trustees to the exclusive benefit of said School . . ." The subsequent amendments to the Charter preserved that purpose and reaffirmed it so that by virtue of the present Charter of the Corporation it is empowered to receive, invest and control funds:

> "as an endowment fund or funds for said University of Maryland, and either, any or all of its several faculties and departments, and to apply the income of such fund or funds in its discretion to the benefit of said University and the several faculties and departments thereof to whichever such fund or funds may respectively appertain."

The complainants find further substantiation in their position by reference to the articles appearing in the publication "Old Maryland" hereinbefore referred to, wherein under the issue of November, 1910, an appeal addressed to the citizens of Maryland urged them to contribute or sub-

scribe to the endowment fund and it was represented to them that the contributions already received had "been safely invested, not by the Regents, but by a corporation of alumni of the University specially chartered for that purpose".

Moreover in the April, 1911, issue of Old Maryland there appeared a printed letter from Drs. Winslow, Hemmeter and Shipley, appealing for funds for the endowment of the Department of Pathology and it was represented to prospective donors that:

> "this fund will be administered by 'The Trustees of the Endowment Fund of the University of Maryland', an entirely independent corporation, not connected with the teaching Faculties of the University."

Other illustrations of similar representations made over a number of years appear in the exhibits filed, and in the December 1910 issue of Hospital Bulletin, the citizens of Maryland were again told that the funds already collected had "been safely invested, not by the Regents, but by a corporation of alumni of the University specially chartered for the purpose".

An appeal made in May of 1911 emphasized that:

> "This fund still be administered by 'The Trustees of the Endowment Fund of the University of Maryland', an entirely independent corporation, not connected with the teaching faculties of the University."

The form of devises or bequests set forth in the School of Medicine catalogue of 1904-05, to the Regents of the University as contradistinguished to those for the endowment fund have already been referred to.

In the 1893-94 catalogue in which the first announcement was made of the formation of The Trustees of the Endowment Fund, it was pointed out that the interest of the fund would "be used solely under their discretion".

This statement was repeated for subsequent years and in the 1902-3 catalogue it was asserted that the Corporation was "independent and self-perpetuating". The latter statement is also found in the catalogues for many subsequent years.

It is argued that such repeated emphasis throughout all the years of the Corporation's existence of the complete independence of the Trustees of the Endowment Fund from the Regents of the University makes it clear that the two were always intended and in fact always were treated as separate and distinct, and that it was never intended that any funds collected for the Endowment Fund should be held invested or administered by the Regents of the University and that this representation was made crystal clear time and time again through various publications as well as official organs of the University. An individual donor was at perfect liberty at any time to give money for endowment purposes to the Regents instead of to the Trustees of the Endowment Fund. Some did, from which it may be assumed that the donors who chose the Trustees of the Endowment Fund as the depositary of their benefactions did so deliberately.

About the time that the contributions were actively solicited, it was not unusual to purposely create separate corporations to administer endowment funds, giving to particular persons as trustees the duty to administer funds rather than permit the executive or administrative officers of an institution to do so.

The effect of Chapter 5 of the Acts of 1952 sweeps out of office the independent members of the Trustees of the Endowment Fund and substitutes for them by legislative act the entire membership of the Board of Regents.

In *Ohio v. Neff*, 52 Ohio St. 375 (1895), the Cincinnati College had been incorporated by specific act of the Ohio legislature in 1819. That act provided that the trustees of the College should be elected annually by the share-

holders (those who had donated funds for the erection of the College). By Sec. 8 of the Act of 1819 it was provided:

> "This act shall be subject to such alterations as the general assembly may from time to time see proper to make."

In 1892 the Ohio legislature passed an act providing in part that:

> "The affairs of the Cincinnati College shall hereafter be under the management of the directors, for the time being, of the University of Cincinnati, which directors shall be, and they are hereby constituted the board of trustees of The Cincinnati College, and they are hereby authorized to exercise all the powers granted by law to the board of trustees of The Cincinnati College."

The Court held the Act of 1892 to be void as contrary to Section 19 of Article I of the Ohio Constitution which declared that "private property shall ever be held inviolate". In its opinion the Ohio Court stated:

> "We come now to the consideration of the provision in the charter of the Cincinnati College, which reserves to the general assembly the right of amendment. * * *
>
> "The authorities agree in holding that the legislative power of amendment and alteration thus reserved in charters, is not absolute, although its boundaries are not yet established. * * *
>
> "Whatever difficulties have been encountered by the courts in ascertaining the limits of this reserved legislative power, they concur in denying that under it, the legislature can strip a corporation of its rights of property. * * *
>
> "The Cincinnati College was the lawful owner of the property in its possession * * * (the) donors entrusted to this chosen instrument of their will a wide discretion respecting the course and method of instruction to which their donations were to be devoted,

and if good faith is to be kept with these donors, we must deny to the legislature the powers to raise the fund thus raised, and transfer it from these chosen agents to others, in whose discretion they did not confide. The power, we think is prohibited by section 19, of article I, of the constitution of 1852, which declares the inviolability of private property." (52 Ohio St. 405-408.)

In another part of its opinion (*Ohio v. Neff*, supra) that Court wrote as follows:

"* * * It is no answer to this to assert that the new directory represents the old corporation, or that the legal title to the property still remains in The Cincinnati College. The mere naked legal title to property has no value, when that title is absolutely severed from its control and beneficial enjoyment. It is the province and duty of courts to look at the substance of a transaction, and to ignore refined and unsubstantial distinctions. And we can see no substantial difference between a statute which expressly creates a new corporation and endows it with the property of another body corporate, and a statute, like the one under consideration, which, finding a corporation already existing, vests in directory of the later all the powers and rights of property which had belonged to another corporate body. And whether we regard the corporation as the actual and potential proprietor of the property in contention, or whether we consider those who contributed to or created this fund or property as such proprietors, and the corporation a mere agency, created to represent them and carry their will into execution, is immaterial in this connection. * * *"

There has not been brought to the attention of this Court any case in which a court has sustained an attempt by a state legislature to amend the charter of a non-stock corporation by special act and thereby remove all members of the corporation and transfer the corporation and all of its

functions and property to other persons. *Ohio v. Neff*, supra, invalidated the legislative attempt there, and in the cases wherein courts have sustained acts of the legislature changing provisions of corporate charters with respect to membership, such amendments do not appear to this Court to be as far-reaching nor to the degree embodied in Chapter 5 of the Acts of 1952.

The defendants rest their case squarely upon *Re: Mt. Sinai Hospital*, 250 New York 103, 164 N. E. 871, 62 ALR 564. An analysis of that decision, however, does not result in the absolute support claimed for it by the defendants. The Corporation was one of the greater charities of the City of New York with a membership numbering about four thousand, and from small beginnings had accumulated property of the estimated value of from $12,000,000. to $15,000,000. The New York Court of Appeals had before it for consideration, Chapter 17 of the Laws of 1925, of the State of New York which provided as follows:

> "The various classes of the board of trustees of the Mount Sinai Hospital, as now constituted, shall continue in office until the expiration of their respective terms, and the successors of said respective classes shall be elected *by a majority vote of the remaining members of the board of trustees* annually upon the expiration of the terms of said respective classes." [emphasis by the New York Court.]

The constitutionality of that statute was challenged not by the corporation but by two members of the society, paying annual dues, one a $10.00 member and the other a donor or $25.00 member.

The New York Court of Appeals stated in *Mount Sinai*, supra:

> ". . . The only question is whether the act violates any of the appellants' constitutional rights to have their contracts unimpaired and their property and liberty uninterfered with, except by due process of law, and to the protection of equal laws.

"The change is not arbitrary or unreasonable. A board of trustees *once elected by the members of the corporation* becomes self-perpetuating." [italics supplied.]

". . . They [the two complaining members] rest on the proposition that, so long as they choose to remain members of the corporation, the Legislature may not, under the reserved power to amend the corporate charter, without their consent, deprive them of their right to vote for trustees."

Continuing with its opinion in the *Mount Sinai case*, the Court refers to the fact that any alteration of a corporate charter may be made ' "which will not defeat or substantially impair the object of the grant or any rights vested under it and which the legislature may deem necessary to secure either that object or any public right" ' or ' "to promote due administration of the affairs of the corporation." ' The Court then goes on to state:

"A state may not, by using the form of charter amendment, deprive a corporation of any of its substantial property or property rights, except in the legitimate exercise of the legislative or police power, under the due process and equal protection clauses of the state and Federal Constitutions. Zabriskie v. Hackensack & N. Y. R. Co., 18 N. J. Eq. 176, 192, 90 Am. Dec. 617; People v. Beskes Dairy Co., 222 N. Y. 416, 3 A. L. R. 1260, 119 N. W. 115. In other words, a corporate charter is no longer a contract between the corporation and the state which the state may not alter without the consent of the corporation; but the corporation and its members are not subject to any kind of confiscatory legislation or discriminatory burden which takes the guise of an amendment to the charter. 'The alterations [under the reserved power] must be reasonable; . . . and be consistent with the scope and object of the act of incorporation'. *Shields v. Ohio*, 95 U. S. 319, 324, 24 L. ed. 357, 359; *Com. v. Essex Co.*, 13 Gray, 239, 253;

People v. O'Brien, 111 N. Y. 1, 52, 2 L. R. A. 255, 7 Am. St. Rep. 634, 18 N. E. 704; *Chicago, W. & St. P. R. Co. v. Wisconsin*, 238 U. S. 491, 501, 59 L. Ed. 1423, 1430, L. R. A. 1916A, 1133, P. U. R. 1915D, 706, 35 Sup. Ct. Rep. 873. Tested by this rule, the amendment is unobjectionable on constitutional grounds and is a proper exercise of the reserved power to alter charters wholly independent of the exercise of the police power of the state. Cf. *Erie R. Co. v. Williams*, 233 U. S. 685, 700, 58 L. ed. 1155, 1161, 51 L. R. A. (N. S.) 1097, 34 Sup. Ct. Rep. 765."

Since such heavy reliance is placed by the defendants upon the *Mount Sinai* case, the Court considers it appropriate to give further excerpts from that opinion so that the difference in degree there existing from are existing is clearly seen, since in effect it is being determined that even assuming that case to be precedent to be followed, there is nevertheless such difference in degree here as makes for a constitutional difference in kind. Further reading from the Court's opinion in the *Mount Sinai* case, we have it there stated:

". . . It [the New York Act] is a governmental regulation of the method of electing trustees, as to which no rule of uniformity exists and which is a common regulation of charitable corporate charters . . ."

"The corporation itself has been deprived of no property 'without due process of law' (U. S. Const. 14th Amendment, § 1), for the provision that the trustees should be elected by its members, although a contractual right between state and corporation, subject to amendment under the reserved power, is not a property right of the corporation of which it could not be deprived without its consent. It has, moreover, sought the change in the law for its benefits and accepted and acted on it; so that the test is not, What are its rights in this regard, but what are the rights of the appellants as members of the corporation? If their privilege to vote for trustees presents any evidence of

ownership or vested right to share in the control of the corporation such as we associate with the idea of property, it may be beyond the power of the Legislature to take it from them. Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 22 L. R. A. (N. S.) 420, 87 N. E. 443."

After stating that a mere voting member of a charitable corporation is not in the same position as a stockholder of a business corporation since he has no interest in the property of the corporation, the New York court uses this language (Mt. Sinai, supra),

". . . The members do not invest their money. They give it to charity. Not the right of a founder, or one who contributes money under express conditions, to have the statutes of his foundation as to the powers of trustees or the terms of his conditions strictly adhered to, except so far as he consents to their alteration. *Allen v. McKean*, 1 Sumn. 277, Fed. Cas. No. 229; *American Printing House v. Louisiana American Printing House*, 104 U. S. 711, 26 L. Ed. 902. Appellants are not founders, nor did they attach any express conditions to the payment of their membership dues. Appellants are not asserting the right of the corporation to prevent the transfer of the corporate property from one board of trustees to another by the creation of a new corporation under a new charter. State ex rel. *White v. Neff*, 52 Ohio St. 375, 28 L. R. A. 409, 40 N. E. 720; *Sage v. Dillard*, 15 B. Mon. 340, 360; *University of Maryland v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 72, for no such transfer is attempted. *The corporation continues to elect its own trustees.* Nor are they asserting the right of the corporation to prevent diversion of the funds raised for the corporation (Bryan v. Board of Education, 151 U. S. 639, 653, 38 L. ed. 297, 303, 14 Sup. Ct. Rep. 465, 470); the corporation and its purposes remain intact." (emphasis supplied.) . . .

"It would be contrary to all correct ideas of the reserved power to say that one who once becomes, by the

payment of annual dues, a voting member of the charitable corporation of 4000 members, becomes also a party to a perpetual contract that he shall not be divested of his voting rights without his consent so that he may insist on retaining his membership to bar the adoption of a detail of administration, such as the method of electing trustees, which is deemed salutary by the Legislature and the corporation. Such is the substance of appellants' claim. We find no authority which compels such a conclusion."

In the annotation to the *Mt. Sinai* case which appears immediately following that decision, it is interesting to note the comment of the annotator. Vide page 574 of 62 A. L. R.:

"An act of the legislature making the trustees of a private charitable corporation a self-perpetuating body by transferring the right to vote for the trustees from the members of the corporation to the board itself, which is accepted by the corporation, does not violate art. 1, § 10, of the United States Constitution, which provides that no state shall pass any law impairing the obligation of contracts, in view of the fact that constitutional and statutory provisions in force at the time of the incorporation reserved to the legislature the power to amend, annul, or repeal the charter. Re Mt. Sinai Hospital (reported herewith) ante, 564 (affirming (1928) 223 App. Div. 836, 228 N. Y. Supp. 855, which affirmed without opinion an order of the special term in (1926) 128 Misc. 476, 219 N. Y. 505)."

It appears to this Court that even without the annotator's statement about the corporation having accepted the change, that *Mt. Sinai* does not validate Chapter 5 of the Maryland Laws of 1952.

In Miller v. State, 15 Wall. 478 (1872), the language of the Court is in part as follows:

"Power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it

cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which by a legitimate use of the powers granted have become vested in the corporation, but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant or to secure the due administration of its affairs so as to protect the rights of the stockholders and of creditors, and for the proper disposition of the assets. Such a reservation, if it is held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use inconsistent with the intent and purpose of the charter, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract."

A summarization of the aforegoing and other cases indicates that a charter amendment which changes the method of choosing the board of directors, trustees or other governing body of a corporation will not necessarily change either materially or substantially the character of the corporation itself. In some of these cases the state itself or a municipality had a financial interest in the corporation and was therefore directly concerned with its organization and management. In the case of *Webster v. Cambridge Seminary*, 78 Md. 193 (1893) the Maryland Court of Appeals carefully pointed out that the power of the legislature to amend charters under its reserved power "could not change fundamentally the nature and character of the charter itself. It could not, under the guise of an amendment, substitute a new and different charter with distinct and different purposes, and oblige the stockholders to accept it. Nor could it divest property rights acquired under the legitimate exercise of the powers granted."

Although the case of the complainants has been presented to this Court from many different aspects, none of them has been overlooked by the Court, and careful

consideration has been given to all the points and legal issues raised. In view of the Court's finding, however, on the substantive basic law in favor of the complainants, it is deemed unnecessary to prolong this opinion with a detailed resume of the ancillary propositions submitted. The Court is persuaded with respect to these, to the view contended by the defendants, and if a determinative finding is required to facilitate appeal on such other points, the Court makes such finding.

Courts are loathe to find unconstitutionality and thereby render nugatory an act of the legislature. The Supreme Court in many decisions has delineated the path of caution with which this power of the Court is exercised. Questions as to constitutionality will not be passed upon unless they be essential to the decision.

U. S. v. Delaware & Hudson Co., 213 U. S. 366 (1909);
Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936);
Jones v. Securities Exchange Commission, 298 U. S. 1 (1936).

The burden of showing invalidity rests on him who asserts it.

O'Gorman and Young v. Hartford Fire Ins. Co., 282 U. S. 251 (1931).

Where alternative constructions are possible, the Court should construe so as to preserve the validity of the legislation.

Trade Mark Cases, 100 U. S. 82 (1879);
The Abbey Dodge, 233 U. S. 163 (1912).

Nor is the Court to pass upon the question of the expediency or wisdom of the legislative act.

Hamilton v. Kentucky Distilling Co., 251 U. S. 146 (1919);
Smith v. Kansas City Title and Trust Co., 255 U. S. 180 (1921).

Nor does the Court examine the motive of legislative enactment.

Ex parte McCardle, 7 Wall. 506 (1869).

However where the Court is convinced that there is unconstitutionality, it should not hesitate to express it. Chapter 5 of the Acts of 1952 removes all the members of the Trustees of the Endowment Fund of the University of Maryland and vests complete control of the Corporation in certain persons appointed from time to time by the Governor. If this Act should be valid, it would be competent for the legislature to change the management and control of any eleemosynary or charitable corporation by the expedient of passing a special act amending its charter.

An examination of the records of the State Tax Commission of Maryland presented to this Court discloses that as of December 31, 1950, there were one hundred eighty non-stock charitable foundations incorporated in Maryland. During 1951, twenty-three additional foundations were incorporated; in 1952, thirty-five additional foundations were incorporated and in 1953, fourteen additional foundations were incorporated. The number of non-stock charitable foundations incorporated in this state as of the end of 1953 totals two hundred fifty-two.

If the legislation contested here should be valid, would it not likewise be competent for the legislature by statute to amend the charters of other institutions with the result that they could be made affiliates of another University. The mere expression of the statement may prove shocking, but where would a line be drawn should it not be drawn here. Could a state by special act provide for the taking of the property of a corporation and entrust it to new parties not elected or appointed by each corporation, and without voice in such corporation to express dissent. If an act could amend the charter of an institution, whether it be a college, or a hospital, or a charitable organization, and provide that all the right, duties, obligations, func-

tions, powers and property of the respective institution should be vested in the Regents of a particular College, would this be valid legislation? To hold affirmatively would be to place, in effect, the control and management of other colleges, hospitals and charitable institutions and all of their property, assets and endowment funds within the ambit of legislative enactment and control, and without any control, voice or veto of the respective institutions. If the act is valid here, it is conceivable that the legislature could appoint trustees to take over the management, control and property of eleemosynary institutions, hospitals and universites. If this principle, once established, is not confiscation without compensation and if this should be due process of law under the theory that the legislature possesses reserved power to alter or amend corporate charters, then it must be for another court to determine such a result to be the law of the land.

The difference in degree between a finding of constitutionality here and these possible consequences posed is very considerably less than that existing between the *Mount Sinai* case and the contention of the defendants with respect to Chapter 5 of the Acts of 1952. What has been stated before would apply with equal force to religious and church organizations as well as charitable foundations. It is not unusual today for wealthy donors to create charitable foundations to promote their particular charity, and in the administration of estates, large sums of money are bequeathed to such charitable foundations organized as a result of the will of the donor. Such wills are made with the specific intent that certain individuals shall direct and select the charity, and the management of these charitable foundations is of vital importance to the donor. To amend the charters of these foundations and entirely change the composition of governing boards by legislative act, as here done, would frustrate the intentions of donors aside from the implications of the taking of property without due process.

The Court holds Chapter 5 of the Acts of 1952 to be void. An opportunity will be furnished respective counsel to sub-

mit the form of decree they consider appropriate, consistently with the aforegoing opinion so that the pleadings shall be in proper form for appellate review.

DECREE

The above cause coming on to be heard on Bill of Complaint, Demurrer thereto of the Defendants, B. Herbert Brown, Jr., Edmund S. Burke, William P. Cole, Jr., Edward F. Holter, Louis L. Kaplan, E. Paul Knotts, Arthur O. Lovejoy, Charles P. McCormick, Harry H. Nuttle, C. Ewing Tuttle and Sarah A. Whitehurst, constituting the Board of Regents of the University of Maryland, and the Answer thereto of the Defendant, Maryland Trust Company, the proceedings were read and considered, counsel for the respective parties were heard and the Court having heretofore on August 11, 1954, filed herein its Memorandum Opinion holding that Chapter 5 of the Acts of the General Assembly of Maryland of 1952 is unconstitutional, null and void, the individual Defendants constituting the Board of Regents of the University of Maryland elected to stand on their Demurrer and declined to answer the Bill of Complaint, and it is thereupon on this 14th day of September, 1954, by the Circuit Court No. 2 of Baltimore City,

Adjudged, Ordered and Decreed:

1. Chapter 5 of the Acts of the General Assembly of Maryland of 1952 is unconstitutional, null, void and of no effect whatsoever.

2. Such of the Complainants as are still living and William P. Cole, Jr. and H. C. Byrd are all the members of the Corporation known as "The Trustees of the Endowment Fund of the University of Maryland" and as such are vested with all rights, privileges, duties and obligations conferred and imposed upon the members of such Corporation by the Charter thereof as amended in 1904, 1929 and 1946.

3. The Defendants, B. Herbert Brown, Jr., Edmund S. Burke, William P. Cole, Jr., Edward F. Holter, Louis L. Kaplan, E. Paul Knotts, Arthur O. Lovejoy, Charles P. McCormick, Harry H. Nuttle, C. Ewing Tuttle and Sarah A. Whitehurst, constituting the Board of Regents of the University of Maryland, be and they are hereby enjoined and restrained from interfering with, taking possession of or attempting to exercise any control over the funds, property and assets belonging to the said Corporation known as "The Trustees of the Endowment Fund of the University of Maryland".

4. The Defendant, Maryland Trust Company, be and it is hereby enjoined and restrained from delivering the funds, property and assets belonging to the Corporation known as "The Trustees of the Endowment Fund of the University of Maryland" into the possession or custody of, or for the account, or subject to the order of the Defendants constituting the Board of Regents of the University of Maryland.

5. The Board of Regents of the University of Maryland shall pay the costs of this proceeding.

HERMAN M. MOSER,

Judge.

OPINION

Court of Appeals of Maryland

Argued before BRUNE, C. J.; DELAPLAINE, COLLINS, and HENDERSON, JJ.

HENDERSON, J.—

The question presented on this appeal, from a final decree entered after the Chancellor had overruled a demurrer to a bill of complaint and the appellants declined to answer, is the constitutional validity of Chapter 5 of the Acts of 1952. This Act undertook to amend the charter of the cor-

poration operating under the name of "The Trustees of the Endowment Fund of the University of Maryland" to provide that thereafter its members should be the Regents of the University of Maryland and that "all the rights, powers, duties, obligations; and functions" of its members should be conferred upon the Regents. By its decree, the court below held that the Act is unconstitutional and enjoined the Board of Regents "from interfering with, taking possession of or attempting to exercise any control over the funds, property and assets" of the corporation, and also enjoined the Maryland Trust Company, the agent and custodian of the securities and funds of the corporation, from delivering the same to the Regents. Since the Maryland Trust Company is in the nature of a stakeholder we shall hereinafter refer to the corporation whose charter was amended as "the appellee".

The appellee contends that the Act violates: (1) Article I, Section 10 of the Federal Constitution prohibiting the impairment by a state of the obligation of contracts, (2) the Fourteenth Amendment to the Federal Constitution and its State equivalent, Article 23 of the Maryland Declaration of Rights regarding due process, (3) the Fourteenth Amendment regarding equal protection of the laws, and (4) Article III, Section 40 of the Maryland Constitution prohibiting the taking of private property for public use without just compensation. It also contends (5) that the Act violates Article III, Section 29 of the Maryland Constitution regarding defective title, and (6) Article III, Section 33 regarding special laws. Before discussing any of these points it is necessary to state the corporate and legislative history in some detail.

The appellee was originally incorporated on June 29, 1893, under the name of "The Trustees of the Endowment Fund of the Faculty of Physic of the University of Maryland of Baltimore City", pursuant to the General Corporation Laws of Maryland. Since then the charter has been amended three times: by Chapter 529, Acts of 1904; by Chapter 435, Acts of 1929; and by Articles of Amendment

filed with the State Tax Commission of Maryland on April 9, 1946, pursuant to the General Corporation Laws of Maryland.

At the time the corporation was formed the University of Maryland consisted only of the professional schools in Baltimore City, the part of the University now located at College Park being then known as the Maryland Agricultural College. For the early history of the University see *The Regents of the University of Maryland v. Williams*, 9 G. & J. 365 (1838). A principal school of the University of Maryland in 1893 was the Medical School. The original charter of the appellee recited that it was formed by the nine incorporators as "* * * a corporation for educational purposes in connection with and in aid of the School of Medicine * * * and for the specific object of receiving, investing and controlling an endowment fund for said School of Medicine and applying the income thereof in the discretion of said Trustees to the exclusive benefit of said School". Management was lodged in an executive committee of four of the trustees. Its corporate existence was limited to a period of 40 years.

By Chapter 529, Acts of 1904, the charter was amended so as to change the name to its present form, to correspondingly enlarge its purposes, and to give the corporation perpetual succession. It was provided in Section 2 that the nine persons who were then the members "shall severally continue as such until their membership be terminated by death, resignation or removal." In the event of a vacancy, the remaining members were authorized to fill the vacancy from alumni of the University of Maryland, the membership at all times to consist of five graduates of the School of Medicine and four graduates of the School of Law. These eligibility requirements were eliminated by Chapter 435, Acts of 1929. Section 4, Chapter 529, Acts of 1904, provided for an executive committee of four to be elected by the members annually from among their own number, who were empowered to manage the affairs of the corporation

and to elect a president and secretary and treasurer. It was directed to report annually to the General Alumni Association of the University. The Act also specifically provided that the Act should take effect only after the provisions thereof had been accepted by resolution of the corporation. It was so accepted, as was the amendment of 1929.

At a meeting of the members of the corporation held on March 12, 1946, Articles of Amendment were adopted which struck out all sections of the charter and inserted four new sections. These articles were duly filed with the Tax Commission under the general law. Except for the persons who were named as the then members, the four sections were virtually identical with the provisions of the charter as amended by the Acts of 1904 and 1929, but a requirement that all investments be registered in the name of the trustees was eliminated.

Accordingly, the corporation may be described as a nonstock corporation of a charitable nature, composed of nine members with perpetual succession who are self-perpetuating, the power of management being lodged in an executive committee of four members. Among the powers set out in Section 3 are: "to receive, hold, invest and control any money, funds or other property * * * as an endowment fund or funds for said University of Maryland, and either any or all of its several separate faculties and departments, and to apply the income of such fund or funds in its discretion to the benefit of said University and the several faculties and departments thereof to which ever such fund or funds may respectively appertain." It is also empowered to accept "money, funds or other property in trust for said University and any or all of its several faculties and departments, and the same to administer according to the declared purpose of such trusts".

At the 1951 session of the General Assembly there was introduced and passed House Bill No. 701, reading as follows:

"AN ACT to repeal Section 2 of Chapter 435 of the Acts of 1929, said Act amending the Charter of the Trustees of the Endowment Fund of the University of Maryland, and to enact in lieu thereof a new section, said section to be known as Section 2 and relating to the membership of the Corporation known as 'The Trustees of the Endowment Fund of the University of Maryland'.

"Section 1. Be it enacted by the General Assembly of Maryland, That Section 2, Chapter 435 of the Acts of 1929, be and it is hereby repealed.

"Sec. 2. And be it further enacted, That a new section to be known as Section 2, said section to be in lieu of Section 2 of Chapter 435 of the Acts of 1929 and in lieu of Section 2 of Chapter 529 of the Acts of 1904, be and the same is hereby enacted to read as follows:

"2. The said corporation shall have perpetual succession and its members shall be the Regents of the University of Maryland, constituted and organized at present, and such other or additional members of the said Regents of the University of Maryland as may, from time to time, be appointed as authorized by law; and all the rights, powers, duties, obligations, and functions now conferred by any and every provision of law or by the Charter of 'The Trustees of the Endowment Fund of the University of Maryland' shall be conferred upon the Regents of the University of Maryland, it being the intention of this Act that said Regents shall, from the date of passage hereof, be considered for all purposes as the sole members of the Corporation found [sic] under Articles of Incorporation dated the 29th day of June, 1893, and recorded among the Charter Records of Baltimore City in Liber J. B. No. 31 at folio 167, as said charter has been amended from time to time.

"Sec. 3. And be it further enacted, That this Act shall take effect June 1, 1951."

H. B. 701 having been presented to the Governor, he returned it to the House without his approval on May 7, 1951, noting that the corporation was chartered under the General Corporation Laws and did not derive its existence from legislative act, that the bill would "defeat the purposes" for which the trusts had been created and "frustrate the purpose of the donors," and that its constitutionality appeared to be "extremely questionable." Acts of 1951, pp. 2143, 2144. Nevertheless, the bill was passed over his veto, and became effective June 1, 1952, as Chapter 5, Acts of 1952. It has never been accepted or acted upon by the corporation.

The endowment funds now held by the Trustees amount to about $2,000,000, and the annual income to about $38,000. There are some 42 separate funds, some of which are restricted. In soliciting contributions to the Endowment Fund, emphasis has always been placed on the permanence of the Endowment Fund, the fact that only interest would be expended, and that the Fund would always be managed and controlled by a separate corporation completely independent of the governing body of the University.

The University of Maryland, as now constituted, was formed in 1920 by merger of the old University of Maryland State College of Agriculture. Chapter 480, Acts of 1920. The Regents were vested with the powers of management, and the Act of 1920 was duly approved by the governing boards of the merging institutions. By Chapter 925, Acts of 1941, the number of Regents was increased from 9 to 11. The corporation has the status of a State agency. *University of Maryland v. Maas*, 173 Md. 554; *University v. Murray*, 169 Md. 478. All of the Regents are appointed from time to time, by the Governor.

The contention that the transfer, of the entire power of management and control of the appellee corporation and its funds from the Executive Committee selected by its members to the Board of Regents of the University, is an impairment of the obligation of contract, is met at the outset by the contention that the alteration of the charter is

within the power reserved to the Legislature. Following the decision of the *Dartmouth College* case, 4 Wheat. (U. S.) 518 (1819), that the corporate charter of an educational institution was a contract which the State was forbidden to change by legislative enactment, a reservation of the power to alter or repeal charters thereafter granted was written into the constitutions of many states. It was written into our Constitution of 1851 and restated in our Constitution of 1867 in these words: "* * * all charters granted or adopted in pursuance of this section, and all charters heretofore granted and created subject to repeal or modification, may be altered from time to time, or be repealed; * * *." Article III, Section 48. In the General Corporation Law of 1868 (Chapter 471, Acts of 1868) it was provided in Section 77 that every corporate charter, when granted, should be subject to "all provisions and regulations which may hereafter, by any change in or amendment of the laws of this State, be made applicable to such corporation." In Code (1951), Art. 23, Sec. 1(g), it is provided that "The charter of every corporation formed prior to June 1, 1951, which is subject to repeal or modification and the charter of every corporation formed under the provisions of this Article shall be subject to repeal or modification by public general law of the General Assembly."

Passing the question as to whether the reserved power can be validly exercised by a special act under the circumstances of the instant case, the question arises whether the contract clause of the Federal Constitution can ever be invoked in the case of a corporation formed subject to the reserved power of alteration or repeal. The appellant contends that the reserved power is one of the terms of the contract, and any objections to its exercise must be sought in other provisions of the basic law. In what appears to be the latest expression of the United States Supreme Court on the subject, *Phillips Petroleum Co. v. Jenkins*, 297 U. S. 629, 634, it was said: "The reservation of power to amend is a part of the contract between the States and the corporation and therefore § 10 of Art. I of the Federal Constitution does not apply." Cf. *Noble State Bank v. Haskell*,

219 U. S. 104, 109. But continuing, the court said: "The reserved power is not unlimited and cannot be exerted to defeat the purpose for which the corporate powers were granted, or to take property without compensation, or arbitrarily to make alterations that are inconsistent with the scope and object of the charter or to destroy or impair any vested property right." Many other cases state the proposition that the reserved power cannot be exercised so as to defeat or substantially impair the fundamental purpose for which a corporation is formed. *Holyoke Co. v. Lyman*, 15 Wall. (U. S.) 500, 522; *Shields v. Ohio*, 95 U. S. 319, 324; *Fair Haven R. R. Co. v. New Haven*, 203 U. S. 379, 388; *Breslav v. N. Y. & Queens Elec. Light & Power Co.*, 249 App. Div. 181, 185, aff. without opinion, 273 N. Y. 593; *Sprigg v. Western Tel. Co.*, 46 Md. 67, 78. In *Webster v. Cambridge Seminary*, 78 Md. 193, 205, Chief Judge Robinson said: "The right * * * of the Legislature to alter and amend the charter of the defendant corporation is not, and could not, be denied. At the same time we agree with the appellant that it could not change fundamentally the nature and character of the charter itself. It could not, under the guise of an amendment, substitute a new and different charter with distinct and different purposes, and oblige the stockholders to accept it. Nor could it divest property rights acquired under the legitimate exercise of the powers granted. Independent altogether of the contract clause of the Federal Constitution is the provision which declares that no one shall be deprived of his property without due process of law." It was held that a charter amendment authorizing the directors to enter into a lease of school property was not a fundamental change.

The charter in the instant case is, of course, a contract between the State and the incorporators. As pointed out by Mr. Justice Story, in his concurring opinion in the *Dartmouth College* case, supra (p. 689), there is also "an implied contract springing up, and founded on a valuable consideration, that the crown would not revoke, or alter the charter, or change its administration, without the consent of the corporation. There was also an implied contract between

the corporation itself, and every benefactor upon a like consideration, that it would administer his bounty according to the terms, and for the objects stipulated in the charter."

It may well be that there are also implied contracts between the subscribers to the common fund. The appellee argues that although the State may repeal the charter outright, with consequences that might lead to distribution of the assets to the donors or reversioners, to a trustee appointed by the court under its general equity powers, or, in an appropriate case, to another corporation under the *cy-pres* power conferred by Code (1951), Art. 16, sec. 131 (Ch. 291, Acts of 1931), it cannot compel the corporation or its members and donors to accept a new charter having a different purpose. The contention is that an alteration that would defeat the corporate purpose and prescribe a new one is still forbidden by the contract clause.

It has been said that the *Dartmouth College* case, supra, would perhaps have been decided as it was, even under a reserved power to amend, had the Fourteenth Amendment been then in effect, since it involved a deprivation of property. See Note 40 Harv. L. Rev. 891, and Scott, Education and the Dead Hand, 34 Harv. L. Rev. 1, 9. It has been suggested that reservation of a power to alter or repeal does not extend beyond the alteration or repeal of the franchises conferred by the charter, and cannot affect subsidiary contracts, unless the change can be supported under the police power. Some courts have held that the reservation extends to subsidiary contracts. Note 31 Col. L. Rev. 1163, 1166. In dealing with the internal affairs of corporations, the traditional tests of due process are not strictly applicable, and it has been said that the rule that the change must be confined to the objects for which the charter was primarily granted was borrowed from the English corporation cases. 31 Col. L. Rev., supra, p. 1167 n. 22; *Ware v. The Grand Junction Water Works Co.*, 2 R. & M. 470 (1831). Cf. *Durfee v. Old Colony and Fall River Railroad Company*, 87 Mass. 230 (1862).

The rule that an alteration that defeats or fundamentally changes the corporate purpose is beyond the constitutional power of the Legislature is conceded on both sides. Whether this is true because it is a violation of the contract clause of the Federal Constitution we need not decide. The Supreme Court and our Court of Appeals have both adopted the rule as a constitutional principle which has the status of a vested right, whether it stems from the law of implied contract, the law of property, or the corporation law. If the right is violated, we are constrained to hold that it violates the due process clause of the Fourteenth Amendment as well as the provisions of Article 23 of our Declaration of Rights and Section 40 of Article III of the Maryland Constitution.

The nub of the controversy is the character of the alteration. The appellant says that the fundamental object of the Endowment Fund is to benefit the University, and the administration of the Fund is secondary and of no real importance. We think, however, that the change is fundamental. The charter plan was designed to retain to the donors, through the exercise of discretion by their chosen representatives and their self-appointed successors, a voice in the management and expenditure of the fund, subject, of course, to a veto power by the Regents. The views of this independent group may, from time to time, differ widely from those of the current managers of the University. The plan of public management and private endowment is no more anomolous than the more common one of private management and public contribution.

The appellant argues that the discretion conferred upon the Executive Committee, selected by and from the self-perpetuating members, is not personal but inheres in the office. Hence it might be exercised by court- appointed successors. But we have here no case of necessity, to appoint trustees to prevent a failure of a trust, but simply a case where the Legislature has attempted to remove a private self-perpetuating board and replace it by a public one appointed from time to time by the Governor, without any

necessity to effectuate the general purpose or to protect the public interest.

The appellant attempts to minimize the change by arguing that the discretion in any event is subordinate to the general power of management and control over the University by the Regents under Section 240(d), Ch. 14, Acts of 1952. As we have said, the Regents hold a veto power, but as a practical matter an independent board could withhold or condition their grants in such a way as to secure a reasonable compliance with their views and those of the donors.

The appellant argues that the alleged "independence" is not properly shown by the allegations of the bill and exhibits filed, concerning various representations in the publication of "Old Maryland," sponsored by the University or some of its schools, and catalogues inviting subscriptions to the Endowment Fund. But the independence of those who serve in the capacity of trustees in administering the funds entrusted to the corporation is clear on the face of the charter. The importance of their independence is a major question of fact in the case, and the allegations and exhibits are relevant to that issue, and as bearing upon the implied contracts arising out of the solicitations and subscriptions. This is true even if we assume, without deciding, that the donors parted with all interest in the funds solicited. *St. John's College v. Purnell*, 23 Md. 629, 639. Any donor was, of course, at perfect liberty to make gifts directly to the Board of Regents, and we can only infer that those who chose to channel their gifts through the appellee corporation instead, did so because they preferred it as the repository of their benefactions.

It has been held that a right of management and control, if not a property right in the usual sense, is one of the incidents of ownership that may survive a transfer of the legal and equitable title. In *Allen v. McKean*, 1 Sumner 276, 305 (1st Cir. 1833), Mr. Justice Story said: "Nothing is clearer in point of law, than the right of a founder to have his visitorial power exclusively exercised by the very func-

tionaries, in whom he has vested it. It is the very substratum of his donation. This is not all. The founder has a right to have the statutes of his foundation, as to the powers of the Trustees, strictly adhered to, except so far as he has consented to any alteration of them. But an authority to alter or modify those powers can never be fairly construed into an authority to take them away from his Trustees, and confer the same powers on other persons."

In *Ohio v. Neff*, 52 Ohio St. 375, 401 (1895), the act incorporating Cincinnati College provided that trustees should be elected annually by the donors, and reserved the legislative power of amendment. In 1892, the legislature passed an act placing the management under the control of the directors of the University of Cincinnati. The act was held void. The court said: "It is no answer * * * to assert that the new directory represents the old corporation, or that the legal title to the property still remains in The Cincinnati College. The mere naked legal title to property has no value, when that title is absolutely severed from its control and beneficial enjoyment. It is the province and the duty of courts to look at the substance of a transaction, and to ignore refined and unsubstantial distinctions. And we can see no substantial difference between a statute which expressly creates a new corporation and endows it with the property of another body corporate, and a statute, like the one under consideration, which finding a corporation already existing, vests in the directory of the latter all the powers and rights of property which had belonged to another corporate body. And whether we regard the corporation as the actual and potential proprietor of the property in contention, or whether we consider those who contributed to or created this fund or property as such proprietors, and the corporation a mere agency, created to represent them and carry their will into execution, is immaterial in this connection." Cf. *Sage v. Dillard*, 15 B. Mon. (Ky.) 340, 360, and *Printing House v. Trustees*, 104 U. S. 711, 722. The appellant argues that the case is not in point, for the court was there dealing with a proposed diversion of private funds to an entirely separate institution of a

private character. Nevertheless, the language quoted is apposite here on the question of the effect of a change of control. The case of *Lupton v. Leander Clark College*, 194 Iowa 1008, 187 N. W. 496, holding that a change of name was not a legislative alteration of fundamental charter purposes, is readily distinguishable. So also, is the case of *Bryan v. Board of Education*, 151 U. S. 639, 657, involving a change of location, where the court said: "There is no question of diversion of funds, or of change of control and management."

The appellant relies strongly upon the case of *Jackson v. Walsh*, 75 Md. 304, 312 (1892). In that case the charter of the "Maryland Agricultural College", which had been incorporated in 1856 as a stock corporation, prescribed the method of electing 22 trustees and also provided for an annual appropriation by the State to aid the college. Some years later, the college became financially embarrassed and the Legislature in 1866 appropriated money to pay the indebtedness of the college upon condition that the college make the State the equal joint owner of all its property. This same act reduced the number of trustees to 11 and provded that 4 should be members of the State Board of Education. The act was accepted by the stockholders and a conveyance made. In 1880 the Legislature increased the number of trustees to 12, only 5 of whom were elected by the stockholders, and in 1888, the number of trustees was increased to 18, 5 of whom were elected by the stockholders. Under this act the stockholders elected 5 trustees each year until 1891, when they claimed the right to elect 7 trustees under the Act of 1866. Judge McSherry, speaking for the court, said (p. 313): "To give to the State a more liberal representation in the Board of Trustees * * * interfered with no contractual, vested, or constitutional rights of the private stockholders."

We think the case is distinguishable on several grounds. The decision was rested in part upon the fact that the Acts of 1880 and 1888 "were acted on and acquiesced in by the stockholders of the college with the full knowledge of their

provisions, and thereby were legally accepted". While not stressed in the opinion, it was also a fact that the State appropriations were vital to the continued operation of the college. Upon familiar principles of law relating to corporate reorganization, the giving of control to a financial backer and joint owner of a stock corporation could be upheld as fair and reasonable. Finally, the fact that the State was the equal joint owner gave it a legal right to participate in the management, at least to the extent of its equal ownership and to protect the proposed additions to its investment. Cf. *Miller v. The State*, 15 Wall. (U. S.) 478, where there was a similar change of representation based upon municipal ownership of corporate assets. In the instant case the State has no proprietary interest in the Endowment Fund, the private members are denied any voting rights, and the owners are thus deprived of any participation in the management whatever.

The appellant relies upon the case *In re Mt. Sinai Hospital*, 250 N. Y. 103, 163 N. E. 871. There an act of the New York Legislature, providing for the election of successors to the existing board of trustees of the hospital by a majority vote of the remaining members was upheld. The act was challenged by two out of four thousand dues-paying members, after it had been duly accepted by the corporation. This acceptance would, in itself, serve to distinguish the case. The complainants were neither founders, nor the representatives of founders, but were in the position of minority stockholders opposing a continuity of management approved by the overwhelming majority. In a careful opinion by Judge Pound, the court held that the change disturbed no vested right under the circumstances, but clearly recognized the principle that charter alterations must be reasonable and consistent with the scope and object of the act of incorporation.

In the instant case, we think the complete transfer of management and control over the Endowment Fund to the Board of Regents is arbitrary and unreasonable. It defeats the very purpose for which the corporation was formed, for

there would have been no need whatever for a separate corporation to hold, invest, control and distribute the fund, unless for the purpose of limiting the control of the Board of Regents. The removal of the limitation is, in effect, a nullification of the charter, without any justification arising out of the police power or an existing proprietary interest in the State.

Since we hold that the Act of 1952 exceeds the permissible limits of the reserved power to amend the corporate charter, it is unnecessary to discuss the other points argued in the briefs.

Decree affirmed, with costs.

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IN THE

Supreme Court of the United States

October Term 1955
No. 208

BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND

PETITIONER

vs.

THE TRUSTEES OF THE ENDOWMENT FUND OF THE UNIVERSITY OF MARYLAND

and

MARYLAND TRUST COMPANY

RESPONDENTS

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

BRIEF IN OPPOSITION ON BEHALF OF THE RESPONDENT THE TRUSTEES OF THE ENDOWMENT FUND OF THE UNIVERSITY OF MARYLAND

There are two Respondents, but the Respondent Maryland Trust Company is merely a stakeholder and this Respondent, "The Trustees of the Endowment Fund of the University of Maryland" will be hereinafter referred to as "the Respondent".

QUESTION PRESENTED

It is the contention of the Respondent that the decision of the Court of Appeals of Maryland was based upon an adequate and independent non-federal ground and that, therefore, the Supreme Court of the United States is without jurisdiction to review that decision on writ of certiorari. If, however, it be determined to the contrary, then the federal question presented is:

Was it a violation of the contract clause of Section 10 of Article I of the Constitution of the United States or of the Fourteenth Amendment of the Constitution of the United States for the General Assembly of Maryland, by special Act, to attempt to remove a private self-perpetuating board of trustees of a charitable corporation and replace it with a public one appointed from time to time by the Governor of the State, without any necessity to do so to effectuate the general corporate purposes or to protect the public interest?

STATEMENT

The Respondent was incorporated in 1893 under the general corporation laws of Maryland. (Joint App., p. 58). As presently constituted (Joint App., p. 61), it is a private non-stock corporation of nine members with perpetual succession and a self-perpetuating membership. Its affairs are managed by an Executive Committee of four elected annually by the members from among their own number. This Committee elects from its membership the officers of the corporation.

The corporation was formed and now exists as a body completely independent of the Regents of the University of Maryland. Its purpose is to collect, receive, hold and invest endowment funds to be applied "in its discretion" for the benefit of the University of Maryland. Its assets are presently valued at about $2,000,000.00. The charter

requires the Executive Committee to file a written report annually with the General Alumni Association of the University of Maryland. No report to the Regents of the University is required.

In 1951, the General Assembly of Maryland passed a Bill purporting to amend the charter of the Respondent so as to provide that thenceforth "its members shall be the Regents of the University of Maryland". The Governor of Maryland returned this Bill without his approval, noting that it would "defeat the purposes" for which the trusts were created, would "frustrate the purpose of the donors", and also that he deemed the constitutionality of the Bill to be "extremely questionable". (App. B to Petition, p. 21-22).

In 1952, the General Assembly passed the Bill over the Governor's veto and the Act became effective on June 1, 1952 as Chapter 5 of the Acts of 1952. It has never been accepted by the Respondent as an amendment of its charter (Joint App., p. 9).

It was this Act (attempting to sweep away the *entire membership* of the Respondent corporation and substitute therefor the members of the Board of Regents to whom were to be transferred by legislative decree "all the rights, powers, duties, obligations and functions" (App. A. to Petition, p. 15), and all the property of the corporation) that the Respondent sought to have declared unconstitutional and void in an equity proceeding instituted by it in the Circuit Court No. 2 of Baltimore City. The Petitioner's demurrer having been overruled by the Chancellor, the Petitioner declined to answer and the Chancellor entered a final decree holding Chapter 5 of the Acts of 1952 to be "unconstitutional, null, void and of no effect whatsoever". (App. B to Petition, p. 50). On appeal by the Petitioner, this decree was affirmed by the Court of Appeals of Maryland. It is this decision of the Court of Appeals of Maryland that the Petitioner would have this Honorable Court review on certiorari.

ARGUMENT

1.

There Is No Jurisdiction To Grant The Writ

The Court of Appeals of Maryland based its decision upon an independent and adequate non-federal ground. Accordingly, the Respondent respectfully submits that this Honorable Court has no jurisdiction to grant the writ of certiorari prayed by the Petition. *Lynch v. New York*, 293 U. S. 52 (1934).

We concede that federal as well as non-federal questions were raised below and that one of these federal questions was decided by the Court of Appeals although it did so only in passing. While we would thus admit that a federal question may have been decided, nevertheless, a decision of that question was not necessary to a determination of the cause and was not the basis of the judgment of the state court.

As very clearly stated in the opinion of the Court of Appeals (App. B to Petition, p. 52), three federal constitutional questions and four state constitutional questions were raised below. The three federal constitutional questions raised were whether Chapter 5 of the Acts of 1952 violated (a) the contract clause of Section 10 of Article I, (b) the equal protection clause of the Fourteenth Amendment, and (c) the due process clause of the Fourteenth Amendment. The Court of Appeals expressly refrained from deciding the contract clause question (App. B to Petition, p. 60) and after stating the contention of the Respondent that the Act was in violation of the equal protection clause it made no further mention of the point whatsoever; certainly it did not decide the question. The Court of Appeals did, however, hold that an amendment of the charter of a corporation that defeats or fundamentally changes the corporate purpose violates the due process clause of the Fourteenth Amendment as well as similar provisions of the

Maryland Constitution (App. B to Petition, p. 60). Be that as it may, it is abundantly clear that the decision of the Court of Appeals was based upon two provisions of the Maryland Constitution.

From the very earliest times it has been held that where the decision of a state court rests upon a non-federal ground which independently and adequately supports the judgment of the state court, the Supreme Court will not exercise jurisdiction to review the decision of the state court notwithstanding the raising of federal questions in the state court or the decision of these questions by the state court. *Herb v. Pitcairn,* 324 U. S. 117, 125 (1945).

Actually the Court of Appeals held "that the Act of 1952 exceeds the permissible limits of the reserved power to amend the corporate charter". (App. B to Petition, p. 65). This is a decision as to the construction of the reserved power of amendment contained in the Constitution of Maryland and in the General Corporation Laws of that State. Whether this holding is grounded simply on *stare decisis* or upon an independent examination of Maryland constitutional law need not now concern us. Nor does the fact that Judge Henderson's opinion mentioned in passing the Fourteenth Amendment of the Constitution of the United States erode the non-federal ground upon which the Court's decision is based. The same may be said of this decision as was said by Mr. Chief Justice Hughes of a decision of the Supreme Court of New York:

> "That court, while citing decisions of this Court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the United States." *Lynch v. New York,* 293 U. S. 52, 54 (1934).

See, to the same effect, Mr. Justice Black's dictum in *State Tax Commission v. Van Cott,* 306 U. S. 511, 514 (1939).

An examination of Judge Henderson's complete opinion for the Court of Appeals (App. B to Petition, pp. 51-65), rather than the selected excerpts gathered together by the Petitioner (Petition, pp. 4-5), will show, for example, the numerous non-federal cases considered and cited as authority by the Court.

At most it can only be said that the Court of Appeals held the Act of the Legislature of Maryland invalid as being in violation of the due process clause of the Fourteenth Amendment as well as in violation of the due process clause of the Maryland Constitution and the provision of the Maryland Constitution prohibiting the taking of private property for public use without just compensation. (Petition, p. 5 and App. B, p. 60).

In *New York City v. Central Savings Bank,* 306 U. S. 661 (1939), the Court of Appeals of New York had decided that a state statute was repugnant to the due process clause of the state constitution, that clause being the same as the due process clause of the Fourteenth Amendment which the Court held had also been violated. As stated in the dissenting opinion of Mr. Chief Justice Hughes in *Minnesota v. National Tea Co.,* 309 U. S. 551, 559 (1940), this Court declined jurisdiction upon the ground that the judgment of the state court in applying the state constitution rested upon an adequate non-federal ground, despite the reliance of the state court upon decisions of the Supreme Court.

Contrary to the contention of the Petitioner, the federal question is not interwoven with the non-federal ones. The situation here is not that of *Minnesota v. National Tea Co.,* 309 U. S. 551 (1940), where this Court felt there to be a strong indication that "the federal constitution as judicially construed controlled the decision" of the Supreme Court of Minnesota on a question of Minnesota constitutional law. *Id.* at 556. Nor can it be said here as was said in *State Tax Commission v. Van Cott,* 306 U. S. 511, 514 (1939), that "the court felt constrained to conclude as it did because of the Federal Constitution and this Court's prior adjudica-

tions * * *." Although springing from the same set of facts, the non-federal question of whether Chapter 5 is repugnant to the Constitution of Maryland, and the federal question of whether Chapter 5 is repugnant to the Constitution of the United States, are clearly independent of one another. See *Fox Film Corporation v. Muller,* 296 U. S. 207 (1935).

Even if this Court were to grant the writ of certiorari and decide that the Court of Appeals of Maryland was in error in holding that Chapter 5 of the Acts of 1952 was in violation of the due process clause of the Fourteenth Amendment, nevertheless, the decision of the Court of Appeals of Maryland that the Act was in violation of the due process clause of Article 23 of the Declaration of Rights of Maryland and of Section 40 of Article III of the Maryland Constitution, would still stand unaffected by the decision of this Court. Thus, the net result of consideration by this Court of the decision of the Court of Appeals of Maryland could only be an advisory opinion for the Attorney General of Maryland on a question of federal constitutional law. *Herb v. Pitcairn,* 324 U. S. 117, 125-126 (1945).

2.

The Supreme Court Will Not Undertake To Review A Determination Of The Facts By A State Court

The general principle of law ultimately controlling the decision of the Chancellor and of the Court of Appeals of Maryland in respect to the particular facts of the case before them was, as Judge Henderson noted in his opinion, (App. B. to Petition, p. 60) "conceded on both sides". This principle the Court of Appeals stated thus:

> "* * * an alteration that defeats or fundamentally changes the corporate purpose is beyond the constitutional power of the Legislature * * *."

This rule the Court held had been adopted by the Court of Appeals of Maryland as well as by the Supreme Court "as a constitutional principle which has the status of a vested right"; and the Court went on to hold that any violation of that right would be a violation of Article 23 of the Declaration of Rights of Maryland and of Section 40 of Article III of the Constitution of Maryland, and, in addition, of the due process clause of the Fourteenth Amendment. Was that vested right violated by Chapter 5 of the Acts of 1952? This question Judge Henderson called "The nub of the controversy" (App. B to Petition, p. 60) and the Petitioner calls its resolution "the essential part of the decision" (Petition, p. 9).

Since the principle of law involved in the decision of the constitutional question was conceded, the determination of that question became essentially a determination of the facts and it is, of course, well settled that this Court will not ordinarily inquire into a determination of fact made by a state court. *Grayson v. Harris,* 267 U. S. 352, 357-358 (1925).

In the Bill of Complaint (the allegations of which were admitted by the Demurrer), the Respondent set forth in some detail the history of the University of Maryland (Joint App., pp. 10-14) and also the history of the formation and subsequent amendments of the charter of the Respondent (Joint App., pp. 14-16). The Bill of Complaint and the numerous exhibits filed with it (Joint App., pp. 16-17, 64-91) demonstrated beyond question that the fundamental purpose for the formation of the Respondent as a separate corporation under Maryland law was to provide a means for the creation of an endowment fund for the University of Maryland to be managed and administered by a self-perpetuating board of trustees to be at all times independent of the Board of Regents of the University of Maryland. These facts were reviewed in considerable detail in the opinion of the Circuit Court No. 2 of Baltimore City (App.

B to Petition, pp. 17-20, 26-29, 36-38) and considered again by the Court of Appeals of Maryland who called the importance of the Trustees' independence a major question of fact in the case (App. B to Petition, p. 61). Both the lower Courts thus determined as a matter of fact that the fundamental purpose for the creation of the Respondent and the grant of its original charter was to create a board of trustees entirely independent of the Board of Regents.

There can be no question but that the effect of Chapter 5 of the Acts of 1952 was to take the administration of the endowment fund away from a board of trustees independent of and separate from the Regents and place it entirely in the hands of the Regents. Was this in harmony with the charter and fundamental purposes of the Respondent? The answer is clearly stated in the opinion of the Court of Appeals as follows:

> "In the instant case, we think the complete transfer of management and control over the Endowment Fund to the Board of Regents is arbitrary and unreasonable. It defeats the very purpose for which the corporation was formed, for there would have been no need whatever for a separate corporation to hold, invest, control and distribute the fund, unless for the purpose of limiting the control of the Board of Regents. The removal of the limitation is, in effect, a nullification of the charter, without any justification arising out of the police power or an existing proprietary interest in the State." (App. B to Petition, pp. 64-65).

The determination of these facts leaves nothing for this Court to review since the Petitioner has heretofore and must continue to concede the legal principle applicable in the determination of the constitutional question.

3.

The Decision Of The Court Of Appeals In Maryland Is Not In Conflict With Applicable Decisions Of This Honorable Court

As the sole reason for granting the writ, the Petitioner asserts that there is here involved a federal question of substance not heretofore determined by this Court which has been decided by the Court of Appeals of Maryland in a way probably not in accord with decisions of this Court applicable by way of analogy. Yet, as authority for its contention that somehow a different rule is applicable to non-business charitable corporations, the Petitioner cites only a law review note (54 Harvard Law Review 1368) and two early decisions of this Court, *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U. S.*, 136 U. S. 1 (1890), and *Pennsylvania College Cases*, 13 Wall. 190 (1871). Neither of these decisions has any direct bearing on the question here presented and certainly no part of the decision of the Court of Appeals is in conflict with anything said by this Court in either of those cases.

The statement quoted from the law review note (Petition, p. 11) is to the effect that amendments of charters of non-business corporations which alter the method of selecting its management are held valid on the ground that the right of the members to vote is not a "vested right", but the Court of Appeals did not hold, as indicated by the Petitioner (Petition, p. 10), that the right of a member of a non-business charitable corporation to vote was a vested right from the deprivation of which he was protected by the Fourteenth Amendment. In referring to the rule of law that an alteration of a corporate charter that defeats or fundamentally changes the corporate purposes is beyond the constitutional power of the Legislature, the Court of Appeals said that this Court and the Court of Appeals

"have both adopted the rule as a constitutional princi-

ple which has the status of a vested right, whether it stems from the law of implied contract, the law of property, or the corporation law" (App. B to Petition, p. 60).

The Court of Appeals, in distinguishing the case *In re Mt. Sinai Hospital*, 250 N. Y. 103, 164 N. E. 871 (App. B. to Petition, p. 64), made it abundantly clear that the vested right referred to by it was the "vested right" of a corporation or its members not to have the fundamental purpose or character of the corporation changed by an attempted amendment of its charter and not a "vested right" of a member of a non-business charitable corporation to vote.

The Petitioner would have this Court believe that the decision of the Court of Appeals of Maryland is so novel and of such far-reaching importance that it will require "a re-examination by every state of its corporation law concerning charters and charitable trusts" and that "there are thousands of charitable corporations who may claim immunity from change of corporation charters on the basis of the decision to the detriment of the exercise of legislative rights expressly found in state constitutions" (Petition, p. 10). But the decision of the Court of Appeals of Maryland follows exactly the decision of the highest Court of Ohio in *Ohio v. Neff*, 52 Ohio St. 375, decided in 1895. There is no more reason to fear the consequences of the decision of the Court of Appeals of Maryland stated so dramatically by the Petitioner than there was for the various state Legislatures to fear the effects of the decision in *Ohio v. Neff* decided 60 years ago.

The truth of the matter is that the Petitioner has entirely misconceived the effect of the decision of the Court of Appeals of Maryland. That Court has not held that the right of control and management of all charitable corporations is a personal "vested right". It has held merely that, in the instant case, the management and control of the Respondent by a board of trustees entirely independent of the

Board of Regents of the University of Maryland was the fundamental purpose for which the Respondent was formed and that the Legislature cannot, under the guise of a charter amendment, defeat that fundamental purpose and in effect nullify the charter.

CONCLUSION

We, therefore, respectfully submit that the Petition should be dismissed.

Respectfully submitted,

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